TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 103.

MARIA GUISEPPA RAFFAELA MAIORANO, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED JUNE 5, 1907.

(20,753.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 2, 1908.

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a In the Supreme Court of Pennsylvania in and for the Western District.

COMMONWEALTH OF PENNSYLVANIA, *County of Allegheny, sct:*

Among the records and proceedings of the Supreme Court of Pennsylvania, in and for the Western District, the following may be found as matter of file and of record at No. 48 Oct. Term, 1906, to wit:

1 STATE OF PENNSYLVANIA, *County of Allegheny, ss:*

In the Court of Common Pleas No. Three of Allegheny County, Pa.

No. 478, August Term, 1904.

June 14th, 1904.

478.

MARIE GUISEPPA RAFFAELO MAIORANO
vs.
BALTIMORE AND OHIO RAILROAD COMPANY.

Sums. in Trespass to 1st Monday July 1904, Statement filed June 14th, 1904, Service accepted by McCleave & Wendt, Att'ys for Def't. August 29th Plea filed. May 22nd, 1905, Plaintiff's Amended Aff't of Claim filed. July 8th, 1905, Notice of filing Amended Aff't of claim served on Deft's Att'ys. July 10th, 1905, Rule on Def't to file Bill of Particulars *sec. reg.* July 13th, 1905, Answer to Rule filed. Dec. 14, 1905, On trial list and jury sworn. Dec. 15, 1905, Judgment of compulsory non-suit granted; Dec. 16th, 1905, motion *ex parte* Pl'ffs to take off non-suit filed. Jan'y 22nd 1906, on argument list and motion to take off the non-suit is refused. Jan'y 26, Pl'ff appeals to Supreme Court *Eo Die.* Certiorari filed. Oct.
2 13th, 1906, Petition presented in open Court and copy of record allowed to be filed and shall stand as and for original record in this case. Jan'y 19, 1906 Remittitur filed showing judgment affirmed, *eo die* Exemp. filed. April 22nd, 1907, Supplemental Certiorari filed.

From the Record.

WM. B. KIRKER,
Prothonotary.

The Court of Common Pleas of Allegheny Co. No. 3, Pa.

3 In the Court of Common Pleas No. 3 of Allegheny County, Pa.

No. 478, August Term, 1904.

MARIA GUISEPPA RAFFAELO MAIORANO
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

To the Honorable the Judges of said Court:

The petition of W. S. Thomson and George C. Bradshaw, counsel for appellant in above stated case, respectfully sets forth.

That the record in the above case was made up by the Prothonotary of the Court of Common Pleas of Allegheny County, and delivered to counsel for Appellant, for the purpose of printing the record for Appellant's Paper Book on an appeal to the Supreme Court.

That counsel for Appellant sent said record to Smith Brother, doing business as the Franklin Printing Company, for the purpose of having the aforesaid record copied and inserted in Appel-
4 lant's paper book. That the said printing company completed the said paper book and delivered the same to Appellant's counsel, but did not return the record in the case. That George C. Bradshaw, one of appellant's counsel, went to the printing house and asked for said record and the said printer, after diligent search, reported that the same had been mislaid and could not be found. That afterward, the said G. C. Bradshaw went to said printing house and in conjunction with the employees of said printing company, made a diligent search in every possible place in which said record could be, but although said search has been continued for almost a week, they have been unable to locate said record. Counsel for Appellant state they have used every possible means to recover said record and have been unable to do so.

Counsel for Appellant therefore applied for and secured the consent of Messrs. McCleave & Wendt, Counsel for appellee and defendant, to substitute for said record a correct copy of the record as printed in Appellant's Paper Book, and counsel for Appellant, W. H. Thomson and G. C. Bradshaw, and counsel for appellee, Messrs. McCleave & Wendt, have therefore signed a written agreement,
5 which is attached to — made part of this petition, that the said copy shall be substituted for and stand in place of the original record, and have certified that the same is a true and correct copy of the original record.

Wherefore, your petitioners pray your Honors may order the Prothonotary to file the said copy which is hereto attached and made part of this petition, together with this petition and the agreement of counsel, and that the same may be substituted and stand in place of the original record, and that the same may be certified to the Supreme Court as the record of said case in this Court.

GEO. C. BRADSHAW.
W. H. S. THOMSON.

We hereby consent that the copy of the record hereto attached may be filed as and for the original record in this case.

McCLEAVE & WENDT,
Attorneys for Defendant.

6 And now, to wit, October 13, 1906, the within petition presented in open court and upon consideration thereof it is ordered that the copy of the record hereto attached, together with this petition and the agreement of counsel, shall be filed, and that the said copy of the record shall stand as and for the original record in this case.

BY THE COURT.

7 In the Court of Common Pleas No. 3 of Allegheny County.

No. 478, August Term, 1904.

MARIA GUISSEPPA RAFFAELO MAIORANO
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

And now, October 11, 1906, it appearing that the record in the above stated case has been lost through some inadvertence of the printer who had the record in the office of the Frankling Printing Company for the purpose of making a copy of the record for Appellant's Paper Book, and after diligent search has not been able to find the same.

Now, therefore, we, George C. Bradshaw, Counsel for plaintiff and McCleave and Wendt, counsel for defendant, hereby agree that the following copy of the record shall be filed as and for the original record, and we hereby certify that the same is a true and correct copy of the original record in this case.

G. C. BRADSHAW,
Att'y for Plaintiff.
McCLEAVE & WENDT,
Att'y- for Defendant.

8 *Docket Entries.*

Summons in trespass to the 1st Monday of July, 1904. Statement filed June 14, 1904, service accepted by McCleave & Wendt, attorneys for Def't, Aug. 29th, 1904, plea filed. May 22, 1905, plaintiff's Amended affidavit of claim filed. July 8, 1905, Notice of filing amended affidavit of claim served on Defendant's attorney. July 10, 1905, Rule on Defendant to file Bill of Particulars *sec. reg.* July 13, 1905, Answer to rule filed. Dec. 14, 1905, on trial list and jury sworn. Dec. 15, 1905, judgment of compulsory non-suit granted. Dec. 16, 1905, motion *ex parte* plaintiffs to take off non-suit filed. Jan. 22, 1906 on argument list and motion to take off the non-suit is refused. Jan. 26, 1906, plaintiff appeals to Supreme Court. *Eo die*

Certiorari filed. Oct. 13, 1906, Petition presented in open court and copy of record allowed to be filed and shall stand as and for original record in this case.

From the Record.

WM. B. KIRKER,
Prothonotary.

Court of Common Pleas of Allegheny County, No. 3, Pa.

9 In the Court of Common Pleas No. 3 of Allegheny County.

No. 478, Aug. Term, 1904.

MARIA GUISSEPPA RAFFAELO MAIORANO
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

Plaintiff's Statement.

Plaintiff in the above stated case by G. C. Bradshaw her attorney, brings this action against the Baltimore & Ohio Railroad Company, defendant above named, to recover the sum of Ten Thousand ($10,000.00) Dollars, upon a cause of action of which the following is a statement:

Plaintiff is a resident of Castel Franco, in the Province of Ivallina, Italy, and a subject of the King of Italy, Defendant is a corporation and operates a line of railroad running between the cities of Pittsburgh, Pennsylvania and Baltimore, Maryland.

Plaintiff alleges that on the night of December 23, 1903, plaintiff's husband, Carmine Maiorano, was a passenger on board a cer-
10 tain passenger train owned and operated by said defendant company, running between the Cities of Pittsburgh, Pennsylvania, and Baltimore, Maryland, said train being known as the Duquesne Limited, said train being a fast train running between said cities of Pittsburgh and Baltimore.

Plaintiff alleges that on said night in which her husband had taken passage on said train of defendant company, that said train was ditched or wrecked at a place called Laurel Run, on the line of said company, near the town of Connellsville, and that by reason of said ditching and wrecking of said train, plaintiff's husband was badly injured by reason of escaping steam, and as a result he died.

Plaintiff alleges that the said accident, caused by the ditching and wrecking of said train, was due to the gross negligence, fault and want of care of the said defendant company and that said plaintiff's death was caused by the said negligence and default of defendant's employees, and by their want of reasonable precaution and care in the running of said train, on which plaintiff's husband was a passenger.

Plaintiff alleges that she is a subject of the King of Italy, and that under and by reason of a certain treaty made and
11 entered into between the United States of America and his Majesty, the King of Italy, ratified November 18, 1871, she

is entitled to recover her loss and damage by reason of the death of her husband as is provided by law in the State of Pennsylvania for natives and citizens of this State and of the United States.

Article 2nd thereof reads as follows:

"The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established."

Section 3rd thereof reads as follows:

"The citizens of each of the high contracting parties shall receive in the States and Territories of the other, the most constant protection and security for their person and property, and shall enjoy in this respect the same rights and privileges as are or shall be
12 granted to the natives, on their submitting themselves to the conditions imposed upon the natives." * * *

Section 23rd thereof reads as follows:

"The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other condition, restriction or taxes than such — are imposed upon the natives. They shall therefore be free to employ, in defence of their rights, such advocates, solicitors, notaries, agents and factors as they may judge proper, in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them and likewise at the taking of all examinations and evidences, which may be exhibited in the said trials."

Plaintiff alleges that by reason of said negligence of defendant company she has been damaged to the amount mentioned
13 before, to wit; in the sum of Ten Thousand ($10,000.00) Dollars to recover which she brings this suit.

G. CALVERT BRADSHAW,
Att'y for Plaintiff.

ALLEGHENY COUNTY, *ss:*

Before the undersigned authority personally appeared Lugi Palmerie, who being duly sworn, says that he is the authorized agent of plaintiff in the above stated case, and is entitled as such to make this affidavit in her behalf, and that all the facts set forth therein are true and correct.

LUGI PALMERI*R*.

Sworn and subscribed before me this 13th day of June, 1904.

CALVERT BRADSHAW,
Notary Public.

My Commission expires end of next Session of Senate.

14 In the Court of Common Pleas No. 3 of Allegheny County.

No. 478, Aug. Term, 1904.

MARIE GUISSEPPA RAFFAELO MAIORANO
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

And now, to wit the 29th day of August, 1904, comes the defendant, The Baltimore & Ohio Railroad Company, by McCleave & Wendt, its attorneys, and pleads not guilty.

JOHNS McCLEAVE,
Att'y for Defendant.

15 In the Court of Common Pleas No. 3 of Allegheny County.

No. 478, Aug. Term, 1904.

MARIA GUISSEPPA RAFFAELO MAIORANO
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

Plaintiff's Amended Affidavit of Claim.

And now, to wit, May 22, 1905, comes the plaintiff by her agent and attorney in fact, Lugi Palmerie, and files the following amended and additional affidavit of claim:

Plaintiff is the wife of Carmine Maiorano, who was killed by the accident set forth and described in plaintiff's statement of claim and the person- entitled to recover and for whose benefit this suit is brought are herself, Marie Maiorana, and her two children, Michele Maiorana of the age of four years and Florneria Maiorana, of the age of two years.

G. CALVERT BRADSHAW,
Attorney for Plaintiff.

ALLEGHENY COUNTY, *ss:*

Before the undersigned authority personally appeared Lugi
16 Palmerie, who being duly sworn says that he is the agent for the plaintiff in the above entitled case and her attorney in fact, and as such is entitled to make this affidavit, that all the facts set forth in this amended statement of claim are true and correct.

LUGI PALMERIE.

Sworn and subscribed before me this 17th day of May 1905.

CALVERT BRADSHAW,
Notary Public.

My Commission expires end of next session of Senate.

17 In the Court of Common Pleas No. 3 of Allegheny County.

No. 478, Aug. Term, 1904.

MARIE GUISSEPPA RAFFAELO MAIORANA
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

Defendant's Answer to Rule for Bill of Particulars.

The defendant, the Baltimore & Ohio Railroad Company, for answer to rule of the plaintiff for bill of particulars of the defendant's defence, in the above entitled case, specifies its defence as follows:

First. The defendant denies that plaintiff is the wife of Carmine Maiorana, and that the children mentioned in the plaintiff's amended statement are the children of the plaintiff by her said alleged husband:

Second. The defendant denies that on the night of December 23, 1903, plaintiff's husband, Carmine Maiorana was a passenger on board of a certain passenger train owned and operated by defendant company as alleged, and that the train on which the plaintiff's husband had taken passage was ditched or wrecked at a place
18 called Laurel Run, on the line of said company near the town of Connellsville, and that by reason of said ditching and wrecking of said train, plaintiff's husband was badly injured by reason of escaping steam and that as a result thereof he died.

Third. The defendant denies that the accident alleged was caused by the ditching and wrecking of said train by reason of the negligence or want of care of the defendant company, and that the death of plaintiff's husband was due to the negligence and default of the defendant's employés.

Fourth. The defendant denies that under and by reason of a certain treaty entered into between the United States of America and the King of Italy, ratified November 18, 1871, she is entitled to recover any damages by reason of the death of her husband, under the laws of the state of Pennsylvania.

Fifth. The defendant denies the existence of the treaty between the United States and the King of Italy, alleged in the plaintiff's statement of claim.

Sixth. The defendant avers that by reason of the alienage and non-residence of the plaintiff and her children either in the State of Pennsylvania, or in the United States of America, plaintiff is,
19 under no circumstances, entitled to recover on the cause of action alleged.

Seventh. The defendant denies that plaintiff has been damaged to the amount of $10,000 or any other sum.

Eighth. The defendant avers that plaintiff's alleged husband, Carmine Maiorana, was an alien and a subject of the King of Italy, and that at the time of his alleged death, the plaintiff and her children

were aliens and non-residents of the State of Pennsylvania, and of the United States.

Therefore, plaintiff is not entitled to recover.

McCLEAVE & WENDT,
Attorneys for Defendant.

20 *Motion to Take Off Non-suit.*

And now, to wit, Dec. 16, 1905, comes the plaintiff by her attorney, W. H. S. Thomson, and G. C. Bradshaw, and moves the court to take off the judgment of compulsory non-suit in the above stated case for the following reasons:

The learned court erred in entering said non-suit.

G. C. BRADSHAW.
W. H. S. THOMSON.

And now, to wit, Dec. 16, 1905, the within motion presented in open court and the same is allowed to be filed.

BY THE COURT.

21 *Opinion of the Court.*

McCLUNG, *J.:*

We are of opinion that the determination of this case depends upon the interpretation of our Acts of Assembly, and not upon the treaty between the United States and Italy—that is, that this treaty does not enlarge the scope of our status.

In any event, however, the decision of the case of Deni *v.* R. R. Co., 181 Pa., 525, must control our action, the treaty having been in force when the cause of action in that case arose.

And now, to wit, January 22, 1906, the motion to take off the non-suit in this case is refused.

BY THE COURT.

To which refusal plaintiff excepts and at the instance of her counsel bill sealed.

S. A. McCLUNG. [SEAL.]

22 No. 478 Aug. Term, 1904. Maria Guiseppa Raffaelo Maiorano *vs.* Baltimore & Ohio R. R. Co. G. C. Bradshaw, Attorney at Law Pittsburgh. 615 Bakewell Building. Filed Oct. 13", 1906.

23 In the Court of Common Pleas No. 3 of Allegheny County, Pennsylvania.

No. 478, August Term, 1904.

MARIE GIUSEPPA RAFFAELO MAIORANO
vs.
BALTIMORE & OHIO R. R. COMPANY.

Before Hon. S. A. McClung and a Jury.

Trial Commenced December 14, 1905.

Appearances.

For the Plaintiff, Messrs. Thompson & Thompson, G. C. Bradshaw, Esq.
For the Defendant, Messrs. McCleave & Wendt.

24 ROBERT HAAS sworn.

Examination by Mr. THOMSON:

Q. Where do you live?
A. Connellsville.
Q. Were you living in Connellsville in 1903?
A. Yes, sir.
Q. Now you may state if you were upon a train of the B. & O. on the evening of December 23rd, 1903, and if so, what train and where you were going?
A. We left Pittsburgh at 6.30.
Q. What day was this?
A. December 23rd, 1903.
Q. And where did you take the train?
A. Pittsburgh.
Q. For what point?
A. Connellsville.
Q. A B. & O. train?
A. Yes, sir.
Q. What was the train known as?
A. I think it is the Duquesne Limited.
Q. Now, Mr. Haas, you may state if anything occurred—any accident occurred to the train, and if so, when and about where the accident occurred?

25 A. The accident occurred about twelve minutes of eight. I remember very distinctly, when I got straightened up and looked at the time.
Q. About twelve minutes of eight, in the evening?
A. Yes, sir.
Q. About what point?
A. I think about a mile from Dawson.

Q. Where were you, with reference to Connellsville?
A. That would be seven or eight miles this side of Connellsvill
Q. Where were you when the accident occurred—where were yo
on the train?
A. I was in the rear part of the dining car.
Q. At the table?
A. Yes, sir; at the table.
Q. Well, now, just give the court and jury an idea of what o
curred when the accident happened?
A. Well, we were sitting at the table and I felt a jar, then t
second one, then the third and the crash came. Of course it turn
me over in the car and I fell to the floor.
Q. It threw you to the floor?
A. Yes, sir.
26 Q. The train then came to a stop?
A. Yes, sir.
Q. Suddenly, or otherwise?
A. It stopped suddenly. Then I got up and started up to t
front end, and ran around to the front, and I came to the engi
lying on its side and the smoking car was partly turned over on t
engine and the steam dome of the engine broke under through t
car. What I noticed.
Q. Was it under the car; you mean into the smoking car?
A. Yes, sir; into the smoking car about two-thirds back from t
front end of the car.
Q. State whether or not the steam was escaping?
A. It had been when I just got there, but it was about exhaust
when I got there.
Q. And what condition did you find the smoking car in?
A. It was lying partly on its side, and I was the first one the
and I broke in the window, and in breaking the window the stea
came out.
Q. Anything else; it forced out; it had exhausted pretty well
A. It was the steam. It was a cold night and it just showed
was steam in there. Then we met another man and got
27 hammer.
Q. In what condition was the car, as to being mashed
otherwise?
A. The rear end was mashed in underneath, right on the si
what fell over the dome of the engine.
Q. What did you notice upon the track that apparently caus
the wreck?
A. It was dark, and we was carrying out some bodies, and
stumbled over some timbers.
Q. On the track?
A. Yes, sir.
Q. Where were they with reference to the engine?
A. The engine was partly on one of them, on its side.
Q. What kind of timbers were these?
A. They looked to me like bridge timbers.
Q. About how long?

A. I judge anywheres from eight to twelve feet long. I couldn't tell exactly; it was dark.

Q. What dimensions, as to thickness?

A. I wouldn't know that. It looked to me like twelve by twelve, or ten by twelve; something like that.

28 Q. Square timber?

A. Yes, sir. It looked to me like bridge timber.

Q. Lying across the track, were they?

A. Yes, sir.

Q. You may state whether there were persons killed in the car, and whether you helped to remove them from the car?

A. Yes, sir. I helped to remove quite a number of them.

Q. About how many did you take out of the car, or help to take out?

A. I judge, anyhow, from seven to twelve, I didn't just count, dead and alive, until that relief train came.

Q. Do you remember about how many dead men were carried out of the car?

A. I couldn't say.

Q. About?

A. I judge anywheres from twelve to fourteen that I seen.

Q. They were taken from what car?

A. From the smoking car.

Q. Where were they placed?

A. Just laid up on the bank, anywhere that we could find room.

Q. Did you personally know any of those?

29 A. No, I couldn't only recognize two people, a priest by his garb, and the newsboy by his uniform.

Q. Persons you were not acquainted with?

A. No, sir.

Q. When the bodies were removed, what was done with these bodies?

A. The relief train came and the live ones were put in the car as quick as we could and sent to Connellsville; the dead ones we left lying there. I got on the relief train and went home.

Q. You didn't get on the train with the bodies?

A. I went with the live ones; some of them were alive yet.

Q. Not with the bodies of the dead?

A. No, sir.

Q. Were you at the station or not, at Connellsville, when the bodies were brought to Connellsville?

A. Yes, sir; I was there.

Q. Brought up on the train, were they?

A. Yes, sir.

Q. And then where were they taken?

A. They were placed in a public building close by there.

Q. Close by the depot?

A. Yes, sir.

30 Q. Was that where you last was, or did you see them removed to the undertaking establishment?

A. No, that is the last I saw of them.

Q. Did you see any timber lying in front of the locomotive?

A. Yes, sir. Just one piece in particular I see very well. I stumbled over it in the dark while I was carrying a man out; they were lying slanting across the track, in front of the locomotive.

Q. Was it one of these large timbers you have described?

A. Yes, sir.

Q. Did you see any other large timber near or under any portion of the train?

A. Yes, sir, I saw several more lying there along the side of the track; I judge about three pieces that I noticed.

Q. Was the train, or a portion of the train on the timber?

A. No, the car wasn't; only the engine.

Q. Was the engine upon it?

A. Slightly lying on one end of this long timber.

Cross-examination by Mr. WENDT:

Q. Where was the locomotive, with respect to the tracks, when you first saw it?

31 A. The locomotive lay on its right side, most of it on the west bound track.

Q. This train was proceeding eastward, on the east-bound track?

A. Yes, sir.

Q. And as I understand you, when you first found the locomotive it was not on the east bound track at all, but had crossed over that to the west bound track?

A. Yes, sir.

Q. As a matter of fact, was it wholly outside of the west-bound track, on its side?

A. Yes, sir.

Q. On the right side of the locomotive?

A. Yes, sir.

Q. It was not on the west bound track?

A. It seemed it throwed it on to the west bound track on its right side, the wheels were turned toward the bank.

Q. The wheels were altogether outside of the tracks?

A. Yes, sir; all off the east-bound track.

Q. If there was any part of the locomotive on the west bound track, it would be simply the smokestack and the top of the cab?

A. The cab and the steam dome—the steam dome seemed

32 partly on the east bound track.

Q. The steam dome?

A. Yes, sir; it was turned on its side. The dome went that way: (Indicating)

Q. The timber you say you saw near the locomotive?

A. Yes, sir.

Q. Was that on the west bound track?

A. They lay on the west bound track, part on the east, and the biggest portion on the west bound track.

Q. Where was the balance of the train?

A. The balance of the train was in the rear of the smoking car, back.

Q. Was the smoker just back of the locomotive?
A. The smoker was by the locomotive—probably two thirds of it had went by the locomotive and laying slanting right over the steam dome of the engine.
Q. Was the smoker on the west-bound track?
A. No, it was more on the east bound track, turned off to one side.
Q. On the east bound track?
A. Yes, sir.
Q. Turned on its side?
A. Not altogether, but laying over part.
33 Q. Which side of the smoker was on the locomotive?
A. The left side of it.
Q. Were the balance of the coaches on the track?
A. I couldn't say.
Q. The only timber that you saw under the train or on the track was this one piece that you say was near the locomotive as it lay?
A. Yes, sir.
Q. Was it in front of the locomotive?
A. Yes, sir; in front; it seemed the locomotive was partly on one end of it on the west-bound track.
Q. The rest of the timbers you say were not on the tracks?
A. No, they were scattered around different places.
Q. But not on the tracks nor under the train?
A. This was the only piece that I particularly noticed, that I fell over; I guess I wouldn't have noticed it unless I fell over it.
Q. So far as you know, the other timbers were not on the tracks or under the train?
A. That is all I seen. The one piece.

Redirect examination by Mr. THOMSON:

Q. When you speak of that other piece, you describe two pieces; where was that other large piece of timber?
34 A. It was on the upper side of the west-bound track, it was off the track.
Q. It was off the track?
A. Yes, sir.
Q. The night was dark was it?
A. No, it wasn't so dark—it was dark, of course, but it was not a real dark night.
Q. Did you stop to examine particularly the timbers?
A. No, sir.

JAMES STADER sworn.

Examination by Mr. THOMSON:

Q. Where do you live?
A. Connellsville.
Q. Were you living there in 1902?
A. Yes, sir.
Q. What was your business?
A. I am working in a bank there.

Q. Also in 1903?
A. Yes, sir.
35 Q. What was your business in 1903?
A. Working in a bank.
Q. Is your brother in the undertaking business?
A. Yes, sir.
Q. Was he in 1903?
A. Yes, sir.
Q. Now, you may state if you helped to remove certain bodi from the B. & O. station at Connellsville, in December, 1903, and so, give the date and state the circumstances briefly?
A. Well, on December 23 it was reported in town that the D quesne Limited was wrecked, and my brother—I always assist m brother when he gets busy, after banking hours—it was in the eve ing about half past eight when we heard this. So I drove a wag that night, but they didn't want to use a wagon, so we carried t bodies from the baggage car in which they — brought from t scene of the wreck to the town and they were put in the town ha
Q. You went down to the depot?
A. Yes, sir.
Q. And did you find certain dead bodies?
A. Yes, sir.
36 Q. Where were they?
A. In the baggage car.
Q. About how many?
A. When we got them to the town hall they were counted at for forty in the town hall.
Q. They were first taken there?
A. Yes, sir.
Q. Then, to what point were they removed?
A. Well, the Superintendent of the railroad—there was three u dertakers in the town—and they divided them equally—that wou be thirteen, and one extra made fourteen.
Q. Did a certain number go to your brother's undertaking esta lishment?
A. Yes, sir.
Q. How many?
A. We got thirteen of that lot.
Q. Did you help to remove them to that establishment?
A. Yes, sir. I drove the wagon and assisted in carrying them.
Q. How long did you keep the bodies there?
A. Well, until the B. & O. gave orders *to* for them to be shipp anywheres to their friends.
37 Q. Was there a body among those at your brother's und taking establishment of a man named Carmine Maiorano?
A. Yes, sir. I examined—I searched all the bodies and took r ords of their effects that way and found letters.

(Bundle of four receipts marked Exhibit No. 1.)

Q. I show you four receipts, marked Exhibit No. 1, and you m state where you found those, if you found them?

A. I found those papers in a pocket of the body, that is how, by means of these papers we got his name.

Q. His name appeared on these receipts?

A. Yes, sir.

(Papers marked Exhibit No. 2.)

Q. State whether Exhibit No. 2, being certain letters, you also found them upon his person?

A. Yes, sir. These letters were found upon him.

Q. Did you find other articles upon his person, and if so, would you kindly state what they were?

A. Found letters, a knife, and a B. & O. railroad ticket.

Q. Did you take the number of the B. & O. railroad ticket?

A. Yes, sir; number 39,061, Pittsburgh to New York; bag-
38 gage check number 76,252, Pittsburgh to New York, Central Railroad of New Jersey.

Q. What else?

A. A nickel watch and chain.

Q. Now, did any one come there for the purpose of identifying this Carmine Maiorano?

A. A man by the name of Orestes Pascales came; we found his address from the receipts.

Q. And communicated with him, did you?

A. We had orders from the B. & O. to notify them, the address of any of their friends or families of any of those found in the wreck, and we did notify them, and they notified them.

Q. And did that party come up?

A. Yes, sir.

Q. You showed him the body, did you?

A. Yes, sir; he identified the body as being the man.

Q. To whom did you turn over the effects that you found upon his body, which you have designated?

A. To Orestes Pascales.

39 Q. He is the party who came to identify him?

A. Yes, sir.

Q. When did you turn over those effects?

A. December 26th, 1903.

Q. To whom did you deliver the body?

A. The remains were shipped December 27th, 1903, on train 11, on the B. & O., to James Flanner's undertaking establishment, Grant street, Pittsburgh.

Q. Who paid the expenses of the embalming and the other work?

A. The B. & O. Railroad Company, they ordered it.

Q. In the case of Carmine Maiorano?

A. Yes, sir.

Cross-examination by Mr. WENDT:

Q. What do you know about the payment of expenses?

A. I attend to my brother's books and keep his books for him.

Q. You mean the bill you rendered on account of his services in

connection with this body was paid by the B. & O. Railroad Com
pany?

A. Yes, sir.

40 Q. What became of the ticket which you found?

A. I turned it over with the rest of the effects, to Orest
Pascales.

Q. When you saw this body, as you mention, on which you foun
these articles, it was in a baggage car at the depot, was it; or was
at your brother's establishment?

A. When I found those papers?

Q. When you found the body first on which these papers were?

A. The body was among the lot brought to our place, the thirte
we got when they were *disturbed*.

Q. Did you find any money on his body?

A. There wasn't any money found on this man's body, the onl
one.

Q. Did you find a steamship ticket on his body?

A. No, I have no record of it.

Q. Are you clear about that?

A. I don't remember finding it; if there was a steamship ticket
didn't know it; I didn't know what it was.

Q. Did you make any memorandum of all the effects you found

A. No, sir.

Q. You did not?

A. No, I didn't make any memorandum of all the paper

41 I know they had papers; the bank papers, I knew what the
were.

Q. Then you haven't told us all the effects which you found o
the body and turned over?

A. There were letters and receipts from a banking house for sen
ing money to the old country.

Q. Do you mean that was all the letters and receipts which yo
found?

A. Yes, sir.

Q. Are these all the letters and receipts which you found?

A. There may have been more.

Q. Why haven't you the others?

A. I turned all I had over to this Orestes Pascales.

Q. These, then, were merely some of the papers that were turne
over?

A. Yes, sir.

Q. Not all of them.

A. I don't think that is all of them.

Q. What other papers you did turn over, you don't know now?

A. No, sir, I don't.

Redirect examination by Mr. THOMSON:

Q. Do you remember of any but four receipts that I ha

42 shown you?

A. There may have been more.

Q. Do you remember of any more?

A. I couldn't say whether there were more or not.

Q. Did you take a receipt from Mr. Pascales for the articles that you turned over?

A. Yes, sir.

(Paper marked Exhibit No. 3 shown witness.)

Q. Is this the receipt—Exhibit 3?

A. Yes, sir.

Q. You have designated the letters, a knife, B. & O. Railroad ticket No. 39,061, Pittsburgh, Pa., to New York, baggage check 76,252, Pittsburgh to New York, Central Railroad of New Jersey, and a nickel watch and chain?

A. Yes, sir.

43 ORESTES PASCALES sworn.

Examination by Mr. THOMSON:

Q. Where do you live?

A. Pittsburgh; 907 Wylie Avenne.

Q. How long have you been living there?

A. For the last ten years.

Q. And what has been your business?

A. Banking business, steamship tickets and transferring of money.

Q. Were you in that business in the years 1902 and 1903?

A. Yes, sir.

Q. Did you know Carmine Maiorano?

A. Yes, sir.

Q. About how long had you know him?

A. From July 1902.

Q. That was when you first met him?

A. Yes, sir.

Q. Did you know him well?

A. Yes, sir. I used to see him every day; every night.

Q. Where did he live, or room, with reference to your place of business?

A. Near our place; I can't say where. I used to see him

44 every night.

Q. You saw him every night?

A. Yes, sir.

Q. Would he be in your place of business frequently?

A. Yes, sir; he used to call for his mail at our place every evening.

Q. To get his mail?

A. Yes, sir.

Q. Did you do banking business for him?

A. Yes, sir.

Q. Now you may state in a general way whether or not he had with you certain moneys on deposit?

A. Yes, sir; he had.

Q. Well, now, when did you last see him alive?

A. On the 23rd of December, 1903.

Q. And where did you see him?
A. In the store; right in my place.
Q. Is that where you do your banking business?
A. Yes, sir.
Q. Well, what occurred between you and him and what time day was it?
A. On the 23rd of December, 1903, at five o'clock in the evening.
45 Q. What occurred between you then?
A. He said he was going to New York to meet his broth and he shook hands with me.
Q. Did you pay him any money?
A. The night before he got twenty four dollars.
Q. Was that the last you saw of him living?
A. Yes, sir. On the 23rd, at five o'clock.
Q. Did you know over what road he was going?
A. Yes, sir, he told me——

Objected to as incompetent.
Question withdrawn.

Q. Now, did you see him afterwards, and if so, where and un what circumstances?
A. He left on the 6:30 train
Q. Did you get any word from any person, with reference to death, which led you to go to see if you could identify his body?
A. On Christmas Day there was a man in our place. I do know whether they were people from the B. & O. or a reporter fr the newspapers, and they told me—they asked me if I would kn this man, and I said yes.
46 Q. Did this result in your going anywhere to see if y could identify him; did you go any place to see if you co identify the body?
A. Yes, sir. On Saturday, the 26th of December, we went to C nellsville.
Q. Did you find the body of Carmine Maiorano, and if so, wh did you find it?
A. Yes, sir, we went to Mr. Stader, the undertaker in Conne ville, and we looked among the bodies and we found Carmi Maiorano.
Q. You found this man?
A. Yes, sir.
Q. What do you call him?
A. Carmine Maiorano.
Q. Was he in the undertaking room?
A. Yes, sir.
Q. There were other bodies there, were there?
A. Yes, sir.
Q. You may state whether or not James Stader turned over to y certain effects, certain property?
A. Yes, sir; he did.

Q. And did you give this receipt that is marked Exhibit 3, for the goods that you received?

47 A. Yes, sir; I did.

Q. Now, what did you receive from him?

A. A nickel watch and chain, a railroad ticket, a pocket book, and a knife, and letters, and four receipts.

Q. I show you four receipts marked Exhibit No. 1, and ask you if those are the receipts you received from Mr. Stader?

A. Yes, sir; they are.

Q. And whether you have had them in your possession ever since?

A. Yes, sir; I kept them.

Q. There are also two letters, marked Exhibit 2; state whether you received them?

A. Yes, sir.

Q. Were there any other letters?

A. I don't think there were; just these.

Q. These are all you got?

A. Yes, sir; all the letters I got.

Q. What did you do with the watch?

A. I turned over the watch to his brother.

Q. Did his brother come on from New York, or was it the brother in Pittsburgh?

A. No, he was in New York.

48 Q. What did you do with the knife?

A. I gave it to him too.

Q. What did you do with the railroad ticket?

A. A lawyer from Syracuse, New York, named Gregg, he got his ticket.

Q. Did he come from New York?

A. That is what he said; yes, sir, that is what he said.

Q. He got from you the ticket?

A. Yes, sir; he got the ticket.

Q. What else did he get if anything?

A. Just the ticket; that is all he got.

Q. Did you have a baggage ticket?

A. Yes, sir, I got that.

Q. What was it, a trunk check or what?

A. A small trunk.

Q. On what road?

A. The B. & O. Railroad.

Q. You may state what you did to get the trunk?

A. We went to the B. & O. station in seven or eight days.

Q. After you got the check?

A. Yes, sir; after we got the check, and we found the trunk there and got the trunk and took it along.

49 Q. You took possession of the trunk, did you?

A. Yes, sir; and I turned it over to his brother.

Q. Did you get it on the check that you took down?

A. Yes, sir; on the check I had.

Q. What did you do with the body; did it come into your possession, or custody?

A. We brought the body to Pittsburgh and we turned it ov
Flannery, the undertaker on Grant street, and the next day,
was on Monday, we buried it.

Q. Was his brother here yet?

A. No, sir.

Q. He didn't come until later?

A. No, sir; he didn't come until later.

Q. In looking into these receipts, which are marked Exhib
you may state whether or not those are the receipts which you
for moneys which were forwarded by you to Italy?

A. Yes, sir.

Q. Explain that to the jury.

A. These are the right receipts we give to the person, whoev
is, to send money to Europe.

Q. How did it come that you gave these receipts; o
50 dated July 3, 1903; one March 7, 1903; one October 16, 1
and one October 13, 1902; how did it come you gave
man these receipts?

A. He used to pay me the money to transfer to Europe, a
used to sign them receipts and give them to him.

Q. Have you a book?

A. Yes, sir.

(Book produced and marked Exhibit No. 4.)

Q. Would you turn to the book, for instance, on which this re
of October 13, 1902, was issued; take the receipt of October 16, 1
does this book, Exhibit 4, show the issuing of that receipt on
ber 16, 1903?

A. Yes, sir.

Q. For how much is that?

A. 750 Lire, that is $150.00.

Q. To whom does it show it was issued?

A. To Maria Guiseppa Maiorano, his wife.

Q. That is in favor of her?

A. Yes, sir; sent by Carmine Maorano.

Q. Was this money deposited on that day, or was it in your
session?

A. He pai ' that money to me.

51 Q. Did you send that money to Maria Guiseppa Rafa

A. Yes, sir.

Q. At that time?

A. Yes, sir; at that time.

Q. And how do you send your money to Italy?

A. We have a house in New York we deal with; we send a c
to those people and those people sign a draft to Europe, an
people in Europe, they transmit the money to every one.

Q. Is that your custom?

A. Yes, sir.

Q. And the way you do it?

A. Yes, sir.

Q. What other one have you there?
A. Another book.

(Book marked Exhibit No. 5.)

Q. This book, Exhibit 5, does it show the issuing of this receipt, July 3, 1903?
A. Yes, sir.
Q. For how much?
A. Five dollars, twenty five Lire.
Q. In favor of whom?
52 A. In favor of Michael Maiorano, his father.
Q. Where; in Italy?
A. Yes, sir.
Q. And by whom was the money paid?
A. Carmine Maiorano.
Q. And have you the others?
A. Yes, sir.

(Book marked Exhibit No. 6.)

Q. On March 7, 1903, did you issue the receipt?
A. Yes, sir.
Q. For how much?
A. Twenty five Lire; five dollars.
Q. To whom?
A. Carmine Maiorano; sent to Marie Giuseppa Rafaelo Maiorano.
Q. Was that to his wife?
A. His wife; yes, sir.
Q. In Italy?
A. Yes, sir.
Q. Have you the other?
A. No; I haven't it with me.
53 Q. You have not the book?
A. No, sir.
Q. Did you have a large number of these books?
A. Yes, sir; we have lots of them.
Q. When you issued one of these receipts, did you give him one, or two?
A. We gave them two.
Q. They are the same.
A. Both the same; yes, sir. They send to Europe, to the wife, whoever it is, and they keep one.
Q. The party you issue the receipt to, he sends one?
A. Yes, sir.
Q. And keeps one?
A. Yes, sir; keeps one.
Q. Do you have receipts in response to the money sent?
A. Yes, sir. Here is one, 370 Lire, and one 25 Lire, $5.00, and one here for 315 Lire.
Q. Are these the ones for the receipts I have shown you?
A. Yes, sir.
Q. These three?

A. Yes, sir.

Q. Where is the 750 Lire?

54 A. I don't think I have that with me.

Q. Where do you get these receipts?

A. We got those from the New York people, and they get it from the Postmaster in Europe.

Q. Do they come to you?

A. No, they come to the people in New York, and they send them to us.

Q. How did you happen to have these receipts; do you keep them?

A. Yes, sir; we keep them right along; we don't give them up.

Q. For what length of time had he been depositing money with you?

A. He started to deposit money on the 13th of August, 1902.

Q. Have you a record showing the dates when different moneys were deposited?

A. Yes, sir, right here.

(Book shown witness, marked Exhibit No. 7.)

Q. The book which I show you, marked Exhibit No. 7, what is this book?

A. It is our original book.

55 Q. In which the deposits are entered?

A. Yes, sir; the deposits of money.

Q. Now, then, do you give the depositors a book too?

A. Yes, sir; a small book; a regular bank-book.

Q. That corresponds to this?

A. Yes, sir; that corresponds to this.

Q. When did he make the first deposit?

A. On August 30, 1902.

Q. How much?

A. Twenty dollars.

Q. And the next deposit?

A. October 22, twenty-nine dollars.

Q. And the next?

A. December 27th, twenty-three dollars.

Q. And the next?

A. On March 14th, 1903, twenty-two dollars. July 11th, twenty-five dollars, July 24th, thirty dollars, August 3rd twenty-one dollars, on the 21st of August, twenty-six dollars; on the 29th, eight dollars; September 4th, eleven dollars; on the 12th five dollars; Octo-

56 ber 10th, twelve dollars; on the 31st of October, ten dollars; and November 21st, twelve dollars.

Q. Making a total deposit of how much?

A. Two hundred and fifty-four dollars.

Q. And at the time of his death, was there any balance in your hands?

A. Here is what he drew out: On October 13th he got twenty dollars; December 3rd, two dollars; December 29, thirty-one dollars——

Q. Do you mean you paid that to him?
A. Yes, sir. He drew this out; 1903, September 5th, five dollars; October 16th he sent a money order No. 591——
Q. You mean you sent it to Italy?
A. Yes, sir; for one hundred and forty seven dollars.
Q. Sent to whom?
A. To his wife; December 22, twenty dollars, and the same day he got four dollars.
Q. What was done with the twenty dollars?
A. The day before he left he got that and he came back and got another four dollars after this.
Q. On the same day?
A. Yes, sir.
Q. Making what?
57 A. Two hundred and twenty nine dollars.
Q. Leaving a balance of how much?
A. Twenty-five dollars.
Q. What did you do with this?
A. Turned it over, to his uncle, and he sent this money to his wife.

By Mr. WENDT:

Q. You don't know what his uncle did with the money?
A. He sent by us, the same as we sent this.

By Mr. THOMSON:

Q. State whether you knew this man Maiorano in Italy?
A. I didn't know him in Italy.
Q. About what age, as near as you could judge, was Maiorano?
A. I think about twenty-eight years old.
Q. And what work was he engaged in?
A. He was working at different places, at a furnace and brickyard.
Q. You may state whether he work- much; steadily, or how?
A. Yes, sir, he used to work every day.
Q. How was he as to health?
58 A. He was a strong man, and healthy like.
Q. Sick any?
A. No, I never knew him to be sick.
Q. What were his habits; I mean did he drink?
A. No, he was a sober man. I never saw him drunk or anything.

Cross-examination by Mr. WENDT:

Q. How long have you been in this country?
A. About ten years; ten years in Pittsburgh and three years in Philadelphia.
Q. When did you come to Pittsburgh?
A. Ten years ago.
Q. How long have you been in business on Wylie Avenue?
A. We didn't move since we came to Pittsburgh; always stayed at the same place.
Q. You have been there since you came to Pittsburgh?
A. Yes, sir.

Q. Did you come from Italy?
A. Yes, sir.
Q. What part of Italy?
A. Near Naples.
59 Q. You didn't know Carmine Maiorano in Italy?
A. No, sir.
Q. Did you come from *what* Province of Castel Franco, Italy?
A. No, sir.
Q. You didn't?
A. No, sir.
Q. When did you first meet Carmine Maiorano?
A. In July 1902.
Q. July, 1902?
A. Yes, sir.
Q. In Pittsburgh?
A. Pittsburgh; yes, sir.
Q. Could he speak English at that time?
A. No; he never was here.
Q. Had he just arrived in this country then?
A. Yes, sir; that was the first time he came.
Q. You understood he had just come from Italy?
A. Yes, sir.
Q. July, 1902?
A. Yes, sir.
Q. Where did he live while he was here?
A. Near our place; I can't say.
Q. Do you know where?
60 A. I can't say where.
Q. You don't know where he did live?
A. No; he used to come every evening to get his mail.
Q. You only saw him I suppose, when he came to your place either to get his mail or to make a deposit of money?
A. I used to see him on Sundays too.
Q. You used to see him on Sunday?
A. Yes, sir.
Q. Did you come from the Province of Avellino, Italy?
A. Yes, sir, from the same Province.
Q. Did he ever tell you where he worked?
A. Yes, sir; he says at the brick yard or a furnace; that is all I know.
Q. He was a laborer, was he?
A. Yes, sir; a laborer.
Q. And as I understand you, he couldn't speak English?
A. No, sir.
Q. As I understand you, these receipts which have been produced and identified by you are receipts for the only money which was transmitted by Carmine Maiorano to Italy, as far as you know?
A. Yes, sir.
Q. I show you this first receipt, in point of time, dated
61 October 13, 1902.
A. That is the first receipt.

Q. That is for how much?
A. Sixty-two dollars; 310 Lire.
Q. Are all the deposits which Mr. Maiorano made with you shown on this book?
A. On this book, yes, sir.
Q. All that he made are shown on this book?
A. I don't know if he used to save money other places or not; I don't know.
Q. All the money which went through your hands, whether mailed by you for him, or sent through you to Europe, is shown on this book?
A. No, it don't show the money he used to send to Europe.
Q. It doesn't show that?
A. No, sir; it don't show on that; it just shows only here for a hundred and forty seven dollars, that is the one he sent to Europe.
Q. Well, now, on October 13th, 1902, this receipt here, which you have identified, shows that you received 310 Lire from him?
A. Yes, sir.
62 Q. He had only been in this country since July of that year?
A. Yes, sir.
Q. Was this money deposited with you?
A. He paid that money to me.
Q. Paid it to you?
A. Yes, sir; paid it to me.
Q. Your account does not show you received it from him, does it?
A. That has nothing to do with this.
Q. This receipt here shows that this was to be remitted by you to Marie Guiseppa Rafaello?
A. Yes, sir.
Q. Do you know her?
A. I don't know her, no sir.
Q. You never saw her?
A. I never see her.
Q. And don't know anything about her, I suppose?
A. I know he was married with her. He used to speak with me.
Q. All you know with respect to that is what you derived from what he said?
A. Yes, sir.
63 Q. This receipt dated March 7, 1903, also shows that the amount, $5.00, was to be transmitted to Marie Guiseppa Raefaello?
A. Yes, sir.
Q. And also the receipt for $5.00 of July 3, 1903, shows it was to be transmitted to Michael Maiorano?
A. That was his father.
Q. That you understand, was his father?
A. Yes, sir.
Q. And the receipt of October 16th, 1903, was also, as I understand you, to be transmitted, and was transmitted to Marie Giuseppa Rafaello Maiorano?

A. Yes, sir.

Q. Now, these papers you have identified as being receipts which you received from Europe, through your New York correspondent; Exhibits 8 to 13, inclusive?

A. Yes, sir.

Q. Look at this first receipt, marked Exhibit 8, and state for how much money that is a receipt?

A. 310 Lire, that is $62.

Q. I understand the signature of the party whose receipt this is supposed to be, who is supposed to have received this money,
64 is down in the left hand corner at the bottom?

A. No, these are two witnesses.

Q. Where is the signature?

A. I don't know.

Q. Is there any signature on it?

A. No, this is the stamp of the Post Office, and these two witness-when the postmaster delivers the letter to Marie Giuseppa Rafaello Maiorano.

Q. As I understand it, that is a receipt from the banking house in Rome?

A. No, that is the post office at Castel Franc, November 7, 1902.

Q. You understand that is to be an acknowledgment or a receipt of the money having been paid to Marie Giuseppa Rafaello Maiorano, at Castel Franc?

A. Yes, sir; that shows the money order sent to her has been paid at such a date to the right person.

Q. The Exhibits No. 12 and 9 are for moneys sent; not to this woman, but to Michael Maiorano?

A. Yes, sir; that is his father.

Q. Then the next one, Exhibit 10, is a receipt, as I under-
65 stand you, for money sent to Marie Giuseppa Rafaello Maiorano?

A. Yes, sir.

Q. Isn't that her signature? Or supposed to be?

A. Yes, sir.

Q. For how much money is that receipt?

A. 750 Lire, that is $150.

Q. Did you go to the depot with Carmine Maiorano on the 23rd of December?

A. No, sir.

Q. Did he tell you he was going back to Italy?

A. No, he said he was going to New York to meet his brother.

Q. Did you sell him a steamship ticket to go to Italy.

A. No, sir.

Q. You did not?

A. No, sir.

Q. The railroad ticket which you say you got from Mr. Stader, at Connellsville, you turned over to a lawyer named Gregg?

A. Yes, sir.

Q. He was a lawyer who was employed for the purpose of bringing suit against the railroad wasn't he?

66 A. He said he has got charge of that case, but he never done anything.

Q. He was employed for the purpose of bringing suit against the railroad company, was he?

A. Employed? Yes, sir.

Q. Did you ever ask him to return the ticket to you?

A. Yes, sir. I told Mr. Bradshaw, the lawyer, to write to him and see if he can get the railroad ticket back.

Q. Who engaged this lawyer; was it Carmine Maiorano's brother?

A. He came to our place and he says——

Q. He was a lawyer in New York, wasn't he?

A. He said he was from Syracuse, New York.

Q. Did Carmine Maiorano's brother live there?

A. No, he was at Roslyn, New York.

Q. When you gave this lawyer the ticket, did you authorize him to collect from the railroad company damages for his death?

A. Yes, sir; that is what he said; he would bring suit against the Baltimore and Ohio Railroad.

Redirect examination by Mr. THOMSON:

67 Q. As I understand, when moneys, were deposited with you as a banker, they were entered in this book?

A. Yes, sir.

Q. But he came to you to pay certain money to be forwarded to Italy, you did not enter it in that book?

A. No, sir.

Q. Then were there other deposits and other remittances by you than those that are shown by these receipts?

A. I suppose there were some more, but I can't find them. I can't go over all the books.

Q. You do business with a very large number of people?

A. Yes, sir.

Q. About how many books of this kind would you have?

A. One of those books lasts us a month, or a month and a half, or so.

Q. About how many of these are there in a book?

A. Five hundred.

Q. When was it that this lawyer got this ticket from you?

A. I seen this man on a Saturday night, the day after Christmas, the 26th of December.

Q. Was that just after the accident?

A. Yes, sir.

Recross-examination by Mr. WENDT:

68 Q. All the money that you know of, that you transmitted to Italy, on account of this man Carmine Maiorano, has been mentioned by you here, and you produce your books showing your memoranda of it, as I understand?

A. That don't show money that he sent.

Q. Do you know of any other specific sum that he ever sent, that is not represented by these memoranda that you produce here?
A. There ought to be some more.
Q. Do you know of any?
A. Yes, sir.
Q. Well name them?
A. I don't remember the date and the amount.
Q. You don't remember the date or the amount?
A. No, I have to go over all them books to find out.
Q. Can you tell us whether it was $5.00, more, or less?
A. I don't know.
Q. You are merely guessing that there was some more?
A. I know for sure; he used to send money every month or so.

69 VALENTINE GABRIEL sworn.

Examination by Mr. BRADSHAW:

Q. Where do you live?
A. South Side, in Lower St. Clair Township.
Q. In what business are you?
A. Foreman of a brick yard.
Q. Where is this brick yard?
A. At the head of 21st street, on the South Side, Pittsburgh.
Q. Do you know of ever having employed Carmine Maiorano?
A. I do.
Q. When was that?
A. In 1903, in the fall of the year.
Q. 1902 and 1903?
A. No, this was in 1903; two years ago.
Q. How long was he working for you?
A. In the neighborhood of three months, as near as I can remember.
Q. In what employ did you have him; what did he do?
A. Well, what was commonly called car pushing.
Q. Was it an ordinary laborer's work?
A. Yes, sir, it was the ordinary laborer's work.
70 Q. Did he receive the ordinary laborer's wages, or what did he receive?
A. He received $1.65 per day.
Q. Was he a steady worker while employed by you?
A. Well, he was employed with us; and we considered him a very good man.
Q. What were his habits?
A. Very steady.
Q. Was he employed by you at any other time except these three months?
A. That is all I can remember of; those three months. I couldn't say whether it was three months or more, unless I referred back to the time book.

Cross-examination by Mr. WENDT:

Q. As near as you can recollect, he was just employed about that length of time—about three months?
A. Yes, sir; as near as I can recollect.
Q. Was he at work every day during that time, or not?
A. Every day that we required his services he worked.
Q. You didn't require his services every day?
A. Well, some odd days we would break down the machinery, that he couldn't work.
71 Q. Your works were idle part of the time?
A. A very few days that he lost.

SYLVIO MAIORANO sworn, and examined through the Official Interpreter.

Examination by Mr. THOMSON:

Q. Are you a brother of Carmine Maiorano?
A. Yes, sir.
Q. Where do you live?
A. Webster Avenue, Pittsburgh.
Q. Where did you live in December, 1903?
A. On Washington street.
Q. Where were you at the time of the death of your brother?
A. Roslyn, New York.
Q. Were you there just for a short time, or working there?
A. I was there to work.
Q. How long had you been there?
A. A month.
Q. Had you received word from your brother that he was
72 to visit you on Christmas of 1903?

Objected to as leading.

Q. Did you receive word from your brother of a visit to you on Christmas of 1903, and if so, how did you get that word?
A. By Postal Card.
Q. Have you the card?
A. I have it at home, in my pocket.
Q. How old was your brother?
A. Twenty-eight years.
Q. Was he a strong man, or delicate; or what was his condition of health?
A. A strong man, in good health.
Q. What were his habits; temperate or intemperate?
A. Sober.
Q. Was your brother married?
A. Yes, sir.
Q. And when was he married, and where; if you know?
A. He married in 1900 at Castel Franc.
Q. In Italy?
A. Yes, sir.

Q. Were you present at the marriage?
73 A. Yes, sir.
Q. Where was he living at that time with you; that is, were you living together at the time of his marriage?
A. Yes, sir.
Q. After he was married, in 1900, did you live in the same house with him?
A. Yes, sir.
Q. And how long did you live together in the same house, after his marriage?
A. Two years.
Q. Did you know his wife before the marriage?
A. Yes, sir.
Q. What was her name?
A. Marie Giuseppa Raffaelo.
Q. How do you spell the last name?
A. R-a-f-f-e-l-o.
Q. Were you in Italy at the time he came to America?
A. Yes, sir.
Q. And when did he come to America?
A. 1902.
Q. Do you know the month he came?
A. On the 25th of June.
Q. And where were they living in Italy at the time he came to this country?
74 A. Castel Franc.
Q. When did you see the wife last?
A. I saw her last when I came to America, in 1903.
Q. Was she living in the same place in Italy?
A. Yes, sir.
Q. Had your brother children, and if so, would you give us their names?
A. Yes, sir; two; one, a boy, called Michael, and a girl, Philomena.
Q. Were they living when you left Italy?
A. Yes, sir.
Q. Did you see your brother after he was killed?
A. No, sir.
Q. And when did you reach Pittsburgh, after his death?
A. On the 3rd of June.
Q. 1904?
A. Yes, sir.
Q. What are the ages of the two children of your dead brother?
A. The boy is five years of age and the girl is three.
Q. Did you receive from Mr. Pascales a nickel watch, or any property belonging to your dead brother?
75 A. Yes, sir.
Q. What did you do with that property?
A. I sent it to Italy.
Q. And what did that consist of?
A. Just the watch.

Cross-examination by Mr. WENDT:

Q. Were you older, or younger than your brother?
A. Younger.
Q. When did you leave Italy?
A. Two years ago.
Q. What month?
A. The month of June.
Q. June 1903.
A. Yes, sir.
Q. When did your brother leave Italy?
A. Three years ago.
Q. What month?
A. 25th of June.
Q. That would be 1902?
A. Yes, sir.

Q. Were you living with your brother in Italy just previous
76 to the time you left Italy?
A. Yes, sir.

Q. Have you more than one brother?
A. I have another one.
Q. Where is he?
A. Roslyn, New York.
Q. When were the children of your brother born, do you remember?
A. The boy was born on the 13th of October, 1900, and the girl was born on the 9th of October, 1902.
Q. Whereabouts was your brother Carmine married?
A. In Castel Franc, in church, and at the municipality.

Here Court took a recess until 1 o'clock P. M.

Afternoon Session.

And now, the hour of one P. M. having arrived, Court met pursuant to adjournment.

SYLVIO MAIORANO recalled for further cross-examination.

Examination by Mr. WENDT:

Q. With whom did your brother Carmine live in Italy after his marriage?

77 A. With my father.

Q. Then before your brother left Italy, he and his wife had been living with your father?
A. Yes, sir.
Q. And your father had been contributing to their support?
A. Yes, sir.
Q. And after your brother Carmine left Italy, where did his wife live?
A. My house; my father's house.

Q. What employment was your brother's wife in after he le
Italy?
A. Worked in the country, on the farm.
Q. Did she work out in the fields?
A. Yes, sir.
Q. And when you left, in 1903, she was still living with you
father and working on the farms in the neighborhood, was she?
A. Yes, sir.
Q. Have you been back to Italy since 1903?
A. No, sir.
Q. Did you ever hear whether your brother's wife had marri
again or not?
78 A. She is not married again.
Q. Where were you *born* on December 23rd, 1903?
A. New York; at Roslyn.
Q. When did you first come to Pittsburgh?
A. On the 12th of June, 1903.
Q. How long did you stay in Pittsburgh at that time?
A. Three months.
Q. Was your brother working while you were in Pittsburgh
1903?
A. Yes, sir.
Q. Where?
A. At the furnace.
Q. What furnace?
A. Frankstown Avenue.
Q. Where did your brother live in Pittsburgh in 1903?
A. Basin Alley.
Q. After your brother left Italy, in 1902, had he ever returned
Italy prior to his death?
A. No, sir.

By Mr. THOMSON:

Q. Do you know what wages he was receiving at the furnace?
A. $1.50 a day.
79 Q. Before your brother left Italy, was he engaged at wo
supporting the family?
A. Yes, sir.

By Mr. WENDT:

Q. At what occupation did your brother work in Italy?
A. He worked as a farmer.
Q. What wages did he earn, in Italy, per day?
A. I don't know; he worked for himself.

LOUIS PALMIERE sworn, and examined through the Official Interpreter.

Examination by Mr. THOMSON:

Q. Are you an Italian?
A. Yes, sir.
Q. Where did you live in Italy?
A. Castel Franc.
Q. Are you related to Marie Giuseppa Raffaelo?
A. Yes, sir.
Q. What relation?
80 A. She is my niece.
Q. Was she living in the same town?
A. Yes, sir.
Q. And where did she live with reference to Carmine Maiorano before they were married?
A. Lived in the same town.
Q. About how far apart?
A. About five or ten minutes' walk.
Q. Do you remember of hearing of the marriage?
A. Yes, sir.
Q. State whether you were at the house of Carmine Maiorano at any time?
A. Yes, sir.
Q. Frequently?
A. Yes, sir.
Q. When?
A. I don't remember.
Q. What year did you come to this country?
A. September 7, 1903.
Q. Do you remember of Carmine Maiorano leaving Italy?
A. Yes, sir.
Q. When did he leave?
A. June, 1902.
81 Q. Have you been at his house during the year preceding the time that he left?
A. Yes, sir.
Q. Was your niece living there with him?
A. Yes, sir.
Q. How often would you be at the house?
A. Very often; I couldn't say how many times.
Q. Did you find them living together as husband and wife?
A. Yes, sir.
Q. Had they children?
A. Two.
Q. Do you know their names?
A. Yes, sir.
Q. What are they?
A. The boy Michael, and the girl Philomena.

Cross-examination by Mr. WENDT:

Q. Whereabouts did Carmine Maiorano live in Italy?
A. Castel Franc.
Q. Did he live in the town or in the country?
A. In the country.
Q. Did he live with his father?
A. Yes, sir.
82 Q. Did he live in his father's house?
A. Yes, sir.
Q. While he was in Italy, did he help his father in his fath work?
A. Yes, sir; he worked for the family in the family, for his fat
Q. What was his father's business?
A. Farmer.
Q. Where did Mariw Giuseppa Raffaelo live after Carmine M rano left Italy?
A. With the father of Carmine Maiorano.
Q. And what did she do for her support?
A. Worked at the country work, farming work.
Q. How far from Maiorano's house did you live?
A. About fifteen minutes' walk.
Q. When did you see Maria Raffaelo last?
A. Two or three days before leaving.

83 RALPH MINETTI sworn.

Examination by Mr. THOMSON:

Q. Where have you been living for the last two years?
A. 2115 Carson Street, South side.
Q. And did you know Carmine Maiorano?
A. Yes, sir.
Q. How long did you know him?
A. I know him since he came to this country.
Q. That would be how long?
A. He came in here about the tenth of July, it will be four y next July.
Q. Did you know him quite well?
A. Yes, sir.
Q. What kind of a man was he, as to his habits; was he a dr ing man, or a sober man?
A. He was a sober man; he was a good man.
Q. And as to work?
A. He was a good working man.
Q. Do you know of his being employed in different places?
A. Yes, sir.
Q. Where, for instance?
A. He has been at work on the south side, in the brick y
84 Q. Do you know how long he worked in the brick y there?
A. I think three or four months; something like that; I ain't s

Q. Where else did he work?
A. He worked one month in Allegheny somewhere, on a furnace.
Q. Did you see him from time to time?
A. Yes, sir; pretty near every Sunday.
Q. What would you say as to his employment; was he generally employed during this time; that is, was he generally at work during the time you knew him?
A. Yes, sir; he — working at the time I knew him, pretty steadily. Steady work, as long as he got it.
Q. Had you occasion to know about what wages he was receiving?
A. Well, at the time he was working at the brick yard he was receiving $1.65 a day.
Q. And at other times, did you receive his wages?
A. One time I received his wages off his boss; he gave me the check and I got his money on it.
Q. For what length of time would that be; one week?
A. I think it was one week; it was nine dollars.

Cross-examination by Mr. WENDT:

Q. Was Maiorano sick when you got his money for him?
85 A. No, he went to work some place else.
Q. The only place you know he worked was at the brick yard and at the furnace?
A. At the brick yard and at the furnace in Allegheny; out Frankstown Avenue, for Jones & Laughlin.

Redirect examination by Mr. THOMSON:

Q. From what part of Italy were you?
A. I came from the same city he comes from.
Q. Do you know of the custom as to how married woman are addressed; say letters are written or orders are sent to them; in what name are they sent, their maiden name or their married name, in Southern Italy?
A. They generally send them in the name they have before they are married; they generally do that; but sometimes they do as they please.
Q. Is it common to send them in the name that they had before they were married?
A. Yes, sir; that is the idea. When I write to my mother, I write to her name that she had before she was married.

86 JOSEPH NATALI sworn.

Examination by Mr. THOMSON:

Q. How long have you been in this country; a number of years?
A. Yes, sir.
Q. And you were from what country?
A. Do you mean from what part of Italy?
Q. Yes.
A. Lucca.

Q. Where is the province of Avalieno?
A. It is in the southern part of Italy.
Q. And Castel Franc, where is that?
A. I suppose it is in the southern part; I don't know exactly—I know the provinces in the southern part of Italy.
Q. Do you know of the custom in southern Italy, as to how married women are addressed in writing letters or sending money to them?
A. Yes, sir; they are frequently in their maiden name; in fact they use their maiden name.
Q. Is that the usual custom?
A. Yes, sir.
Q. I show you two letters, marked Exhibit 2; you may state how they are signed; the name is written in Italian; what
87 is the name?
A. At the bottom of this I find the name of Marie Giuseppa Raffaelo.
Q. Look at the other?
A. Yes, sir; at the bottom; Marie Giuseppa Raffaelo.
Q. Is that the same name that you see upon the receipts?
A. Yes, sir.
Q. How is the man addressed in that letter?
A. "My dearest husband."
Q. And in this one?
A. This is: "My dear brother."
Q. The second page is what?
A. "My dear husband"; the first page is signed by Maiorano Pasqualle.
Q. The second, third and fourth pages?
A. By Marie Quiseppa Raffaelo.
Q. The last letter to which I have referred is what date?
A. November 13th, 1903.
Q. And the date of the other letter?
A. November 23rd, 1903.

Plaintiff offers in evidence the four receipts marked Exhibit
88 No. 1.
Objected to as incompetent.
By Mr. THOMSON: We offer them for the purpose of identifying the party; at least to show that these receipts were given to this man and were found on the body.
Objection withdrawn, if that is the only object.
It is admitted that the papers were found upon his person.
Counsel for plaintiff also offer in evidence Exhibits 8, 9, and 10,, being the receipts received by Mr. Pascales for moneys transmitted to the wife of the deceased.
Objected to as incompetent.
By the COURT: They are not proven. Objection sustained.
Counsel for plaintiff also offer in evidence the letters marked Exhibit 2, for the purpose of identification, as being found upon his person.

89 By the COURT: We will let them go in, the fact that those letters were found, as part of the identification of the body, without having them read to the jury.

Counsel for plaintiff also offer in evidence Exhibit No. 7, being the book of the banker, the original entries showing the amount of deposits from August 30, 1902, to November 21, 1903, and the moneys drawn out by the deceased.

G. C. BRADSHAW sworn.

Examination by Mr. THOMSON:

Q. It seems, Mr. Bradshaw, that some attorney named Gregg was employed in the case on behalf of the plaintiff; a party living in Syracuse, New York; you may state if you were later employed, and about what time?

90 A. About May, I believe, in 1904, Mr. Palmieri came into my office with another Italian whom I knew and told me about this case, and said the papers in the case had been given to a man named Gregg, who lived in Syracuse, New York.

Q. Certain papers?

A. Yes, sir; certain papers.

Q. Did you endeavor to get those papers from him?

A. I wrote to him.

Q. Have you a copy of the letter which you wrote, together with his reply?

A. Yes, sir.

Q. Were you able to get from him the papers which he had received?

A. No; he never sent them.

Q. Did he demand a certain amount of money?

A. Yes, sir.

Q. How much?

A. $300.

Cross-examination by Mr. WENDT:

Q. This lawyer mentioned had been employed on behalf of the State or relatives of Maiorano before you were employed?

91 A. Well, I know nothing about that; he may have been; I know nothing about it.

Q. You were informed to that effect, weren't you?

A. Mr. Palmieri said this man came to him after the accident and had asked him to allow him to take the case, shortly after the accident, and he was afraid he was not attending to it; that is all I know about it.

Plaintiff rests.

Counsel for defendant moves the Court to grant a judgment of compulsory nonsuit in this case, for the following reasons:

First. It appears by the plaintiff's evidence that the deceased Carmine Maiorano was an alien, and a citizen or subject of the King of

Italy, and that the plaintiff Marie Guiseppe Maiorano, his alleged widow, is and always was a subject of the King of Italy, and a resident of the Kingdom of Italy, and never was a resident of Pennsylvania or the United States of America, and therefore being an alien, and a non-resident of the State of Pennsylvania and of the
92 United States at the time of the decedent's death, and at the time of the bringing of this suit, the plaintiff cannot recover.

Second. It appears from the plaintiff's evidence that the deceased Carmine Maiorano left his residence and home in Italy in 1902, and never returned thereto, and so far as it appears had taken up his residence in the United States of America without any intention of returning to Italy; and it does not appear by the plaintiff's evidence that the family relation of husband and wife existed at the time of the decedent's death, therefore the plaintiff cannot recover.

Third. There is no sufficient evidence in the case of negligence on the part of the defendant to warrant recovery on the part of the plaintiff.

Plaintiff asked leave to offer the treaty in evidence, between the United States of America and the Kingdom of Italy signed February 26, 1871, ratified April 29, 1871, ratification exchanged No-
93 vember 18, 1871, and proclaimed November 23, 1871, in the United States Statutes at Large, Volume 17, page 845.

No objection.

Motion for non-suit granted.

94 I, Edward J. Donnelly, official stenographer of the Court of Common Pleas No. 3 of Allegheny County, do hereby certify that the foregoing pages contain a full, true and correct transcript of my notes of trial of the case of Maiorano *v.* Baltimore & Ohio R. R. Co.

E. J. DONNELLY,
Official Stenographer.

The foregoing notes of testimony, with the exceptions taken by counsel during the trial to the rejection or admission thereof, and the charge, with the exceptions thereto, have been examined by me, and are hereby approved and ordered to be filed.

S. A. McCLUNG,
Trial Judge.

95 *Copy of Treaty Offered in Evidence.*

Treaty Between the United States of America and the Kingdom of Italy.

Commerce and Navigation.

Signed February 26, 1871; Ratified April 29, 1871; Ratifications Exchanged November 18, 1871; Proclaimed November 23, 1871.

By the President of the United States of America.

A Proclamation.

Whereas a treaty of commerce and navigation between the United States of America and His Majesty the King of Italy was concluded and signed by their respective Plenipotentiaries, at the city of Florence, on the twenty-sixth day of February, one thousand eight hundred and seventy-one, which treaty, being in the English
96 and Italian languages, is word for word as follows:

Treaty of Commerce and Navigation Between the United States and the Kingdom of Italy.

The United States of America and His Majesty the King of Italy, desiring to extend and facilitate the relations of commerce and navigation between the two countries, have determined to conclude a treaty for that purpose, and have named as their respective Plenipotentiaries: The United States of America, George Perkins Marsh, their Envoy Extraordinary and Minister Plenipotentiary near His Majesty the King of Italy; and His Majesty the King of Italy, the Noble Emilio Visconti Venosta, Grand Cordon of his orders of the Saints Maurice and Lazarus, and of the Crown of Italy, Deputy in Parliament, and his Minister Secretary of State for Foreign affairs; and the said Plenipotentiaries having exchanged their full powers, found in good and due form, have concluded and signed the following articles:

Article I.

There shall be between the territories of the high contract-
97 ing parties a reciprocal liberty of commerce and navigation. Italian citizens in the United States, and citizens of the United States in Italy, shall mutually have liberty to enter with their ships and cargoes all the ports of the United States and of Italy respectively, which may be open to foreign commerce. They shall also have liberty to sojourn and reside in all parts whatever of said territories. They shall enjoy respectively, within the States and possessions of each party, the same rights, privileges, favors, immunities, and exemptions for their commerce and navigation as the natives of the country wherein they reside, without paying other or higher duties or charges than are paid by the natives, on condition of their submitting to the laws and ordinances there prevailing.

War vessels of the two powers shall receive in their respective ports the treatment of those of the most favored nations.

Article II.

The citizens of each of the high contracting parties shall
98 have liberty to travel in the states and territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, and generally to do anything incident to or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established.

Article III.

The citizens of each of the high contracting parties shall receive in the states and territories, of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives.

They shall, however, be exempt in their respective territories from compulsory military service, either on land or sea, in the regular forces, or in the national guard, or in the militia. They shall likewise be exempt from any judicial or municipal office, and from any contribution whatever, in kind or in money, to be levied in compensation for personal services.

99 Article IV.

The citizens of neither of the contracting parties shall be liable, in the states or territories of the other, to any embargo, nor shall they be detained with their vessels cargoes, merchandise, or effects, for any military expedition nor for any public or private purpose whatsoever, without allowing to those interested a sufficient indemnification previously agreed upon when possible.

Article V.

The high contracting parties agree that whatever kind of produce, manufactures, or merchandise of any foreign country can be from time to time lawfully imported into the United States, in their own vessels, may be also imported in Italian vessels; that no other or higher duties upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other; and, in like manner, that whatsoever kind of produce, manufactures, or merchandise of any foreign country can be from time to time lawfully imported into Italy
100 in its own vessels, may be also imported in vessels of the United States, and that no higher or other duties upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other; and they further agree that whatever may be lawfully exported and re-exported from the one country, in its own vessels, to

any foreign country, may in the like manner be exported or re-exported in the vessels of the other country, and the same bounties, duties and drawbacks shall be allowed and collected, whether such exportation or re-exportation be made in the vessels of the United States or of Italy.

Article VI.

No higher or other duties shall be imposed on the importation into the United States of any articles, the produce or manufacture of Italy, and no higher or other duties shall be imposed on the importation into Italy of any articles the produce or manufacture of the United States, than are or shall be payable on the like articles, being the produce or the manufacture of any other foreign country;
101 nor shall any other or higher duties or charges be imposed, in either of the two countries, on the exportation of any articles to the United States or to Italy, respectively, than such as are payable on the exportation of the like articles to any foreign country, nor shall any prohibition be imposed on the importation or the exportation of any articles, the produce or manufacture of the United States or of Italy, to or from the territories of the United States, or to or from the territories of Italy, which shall not equally extend to all other nations.

Article VII.

Vessels of the United States arriving at a port of Italy, and, reciprocally, vessels of Italy arriving at a port of the United States, may proceed to any other port of the same country, and may there discharge such part of their original cargoes as may not have been discharged at the port where they first arrived. It is, however, understood and agreed that nothing contained in this article shall apply to the coastwise navigation, which each of the two contracting parties reserves exclusively to itself.

102 Article VIII.

The following shall be exempt from paying tonnage, anchorage, and clearance duties in the respective ports:

1st. Vessels entering in ballast, and leaving again in ballast, from whatever port they may come.

2. Vessels passing from a port of either of the two states into one or more ports of the same state, therein to discharge a part or all of their cargo, or take in or complete their cargo, whenever they shall furnish proof of having already paid the aforesaid duties.

3. Loaded vessels entering a port either voluntarily or forced from stress of weather, and leaving it without having disposed of the whole or part of their cargoes, or having therein completed their cargoes.

No vessel of the one country, which may be compelled to enter a port of the other, shall be regarded as engaging in trade if it merely breaks bulk for repairs, transfers her cargo to another vessel on account of unseaworthiness, purchases stores, or sells damaged goods

for re-exportation. It is, however, understood that all portions of such damaged goods destined to be sold for internal consump-
103 tion shall be liable to the payment of custom duties.

Article IX.

When any vessel belonging to the citizens of either of the contracting parties shall be wrecked, foundered, or shall suffer any damage, on the coasts or within the dominions of the other, there shall be given to it all assistance and protection in the same manner which is usual and customary with the vessels of the nation where the damage happens, permitting them to unload the said vessel, if necessary, of its merchandise and effects, and to reload the same or part thereof, paying no duties whatsoever but such as shall be due upon the articles left for consumption.

Article X.

Vessels of either of the contracting parties shall have liberty, within the territories and dominions of the other, to complete their crew, in order to continue their voyage, with sailors articled in the country, provided they submit to the local regulations and their enrolment be voluntary.

104

Article XI.

All ships, merchandise, and effects belonging to the citizens of one of the contracting parties, which may be captured by pirates, whether within the limits of its jurisdiction or on the high seas, and may be carried or found in the rivers, roads, bays, ports or dominions of the other, shall be delivered up to the owners, they provi*di*ng, in due and proper form, their rights before the competent tribunals; it being well understood that the claim should be made within the term of one year, by the parties themselves, their attorneys, or agents of the respective governments.

Article XII.

The high contracting parties agree that, in the unfortunate event of a war between them, the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure, on the high seas or elsewhere, by the armed vessels or by the military forces of either party; it being understood that this exception shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the
105 nav*e*l forces of either party.

Article XIII.

The high contracting parties having agreed that a state of war between one of them and a third power shall not, except in the cases of blockade and contraband of war, affect the neutral commerce of the other, and being desirous of removing every uncertainty which may hitherto have arisen respecting that which, upon principle of fairness and justice, ought to constitute a legal blockade, they hereby

expressly declare that such places only shall be actually invested by naval forces capable of preventing the entry of neutrals, and so stationed as to create an evident danger on their part to attempt it.

Article XIV.

And whereas it frequently happens that vessels sail for a port or place belonging to an enemy without knowing that the same is besieged, blockaded or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but
106 shall not be detained, nor shall any part of her cargo, if not contraband of war, be confiscated, unless after a warning of such blockade or investment from an officer commanding a vessel of the blockading forces, by an endorsement of such officer on the papers of the vessel, mentioning the date and the latitude and longitude where such endorsement was made, she shall again attempt to enter; but she shall — permitted to go to any other port or place she shall think proper. Nor shall any vessel of either, that may have entered into such a port before the same was actually besieged blockaded, or invested by the other, be restrained from quitting such place with her cargo, nor, if found therein after the reduction and surrender, shall such vessel or her cargo be liable to confiscation, but they shall be restored to the owners thereof; and if any vessel, having thus entered any port before the blockade took place, shall take on board a cargo after the blockade be established, she shall be subject to being warned by the blockading forces to return to the port blockaded and discharge the said cargo, and if, after receiving the said warning, the vessel shall persist in going out with the cargo, she shall be liable to the same consequences as a vessel attempting to enter a blockaded port after being warned off by the blockading forces.

107 Article XV.

The liberty of navigation and commerce secured to neutrals by the stipulations of this treaty shall extend to all kinds of merchandise, excepting those only which are distinguished by the name of contraband of war. And, in order to remove all causes of doubt and misunderstanding upon this subject, the contracting parties expressly agree and declare that the following articles, and no others, shall be considered as comprehended under this denomination:

1. Cannons, mortars, howitzers, swivels, blunderbusses, muskets, fuses, rifles, carbines, pistols, pikes, swords, cabres, lances, spears, halberds, bombs, grenades, powder, matches, balls, and all other things belonging to, and expressly manufactured for, the use of these arms.

2. Infantry belts, implements of war and defensive weapons, clothes cut or made up in a military form and for a military use.

3. Cavalry belts, war saddles and holsters.

4. And generally all kinds of arms and instruments of iron, steel, brass, and copper, or of any other materials manufactured, prepared, and formed expressly to make war by sea or land.

108 Article XVI.

It shall be lawful for the citizens of the United States, and for the subjects of the Kingdom of Italy, to sail with their ships with all manner of liberty and security, no distinction being made who are the proprietors of the merchandise laden thereon, from any port to the places of those who now are, or hereafter shall be, at enmity with either of the contracting parties. It shall likewise be lawful for the citizens aforesaid to sail with the ships and merchandise before mentioned, and to trade with the same liberty and security from the places, ports and havens of those who are enemies of both or either party, without any opposition or disturbance whatever, not only directly from the places of the enemy before mentioned to neutral places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of one power or under several; and it is hereby stipulated that free ships shall also give freedom to goods, and that everything shall be deemed to be free and exempt from capture which shall be found on board the ships belonging to the citizens of either of the contracting parties, although the whole lading or any part thereof should appertain to the enemies of the other, contraband goods be-
109 ing always excepted. It is also agreed, in like manner, that the same liberty be extended to persons who are on board of a free ship; and they shall not be taken out of that free ship unless they are officers or soldiers, and in the actual service of the enemy. Provided, however, and it is hereby agreed, that the stipulations in this article contained, declaring that the flag shall cover the property, shall be understood as applying to those powers only who recognize this principle, but if either of the two contracting parties shall be at war with a third, and the other neutral, the flag of the neutral shall cover the property of enemies whose governments acknowledge this principle, and not of others.

Article XVII.

All vessels sailing under the flag of the United States, and furnished with such papers as their laws require, shall be regarded in Italy as vessels of the United States, and, reciprocally, all vessels sailing under the flag of Italy, and furnished with the papers which the laws of Italy require, shall be regarded in the United States as Italian vessels.

110 Article XVIII.

In order to prevent all kinds of disorder in the visiting and examination of the ships and cargoes of both the contracting parties on the high seas, they have agreed, mutually, that whenever a vessel of war shall meet with a vessel not of war of the other contracting party, the first shall remain at a convenient distance, and may send its boat, with two or three men only, in order to execute the said examination of the papers, concerning the ownership and cargo of the vessel, without causing the least extortion, violence, or

ill-treatment; and it is expressly agreed that the unarmed party shall in no case be required to go on board the examining vessel for the purpose of exhibiting his papers, or for any other purpose whatever.

Article XIX.

It is agreed that the stipulations contained in the present treaty, relative to the visiting and examination of a vessel, shall apply only to those which sail without a convoy; and when said
111 vessels shall be under convoy the verbal declaration of the commander of the convoy, on his word of honor, that the vessels under his protection belong to the nation whose flag he carries, and when bound to an enemy's port, that they have no contraband goods on board, shall be sufficient.

Article XX.

In order effectually to provide for the security of the citizens and subjects of the contracting parties, it is agreed between them that all commanders of ships of war of each party, respectively, shall be strictly enjoined to forbear from doing any damage to, or committing any outrage against, the citizens or subjects of the other, or against their vessels or property; and if the said commanders shall act contrary to this stipulation, they shall be severely punished, and made answerable in their persons and estates for the satisfaction and reparation of said damages, of whatever nature they may be.

Article XXI.

If by any fatality, which cannot be expected, and which may God avert, the two contracting parties should be engaged in a war
112 with each other, they have agreed and do agree, now for then, that there shall be allowed the term of six months to the merchants residing on the coasts and in the ports of each other, and the term of one year to those who dwell in the interior, to arrange their business and transport their effects wherever they please, with the safe conduct necessary to protect them and their property, until they arrive at the ports designated for their embarkation. And all women and children, scholars of every faculty, cultivators of the earth, artisans, mechanics, manufacturers, and fishermen, unarmed and inhabiting the unfortified towns, villages, or places, and, in general, all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments and shall not be molested in their persons, nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted by the armed force of the belligerent in whose power, by the events of war, they may happen to fall; but, if it be necessary that anything should be taken from them for the use of such belligerent, the same shall be paid for at a reasonable price.

And it is declared that neither the pretence that war dissolves treaties, nor any other whatever, shall be considered as annul-
113 ling or suspending this article; but, on the contrary, that the state of war is precisely that for which it is provided; and

during which its provisions are to be sacredly observed as the most acknowledged obligation in the law of nations.

Article XXII.

The citizens of each of the contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, by sale, donation, testament, or otherwise, and their representatives, being citizens of the other party, shall succeed *ed* to their personal goods, whether by testament or *ab intestato*, and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein such goods are shall be subject to pay in like cases.

As for the case of real estate, the citizens and subjects of the two contracting parties shall be treated on the footing of the most favored nation.

114 Article XXIII.

The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions, or taxes than such as are imposed upon the natives. They shall therefore be free to employ, in defence of their rights, such advocates, solicitors, notaries, agents, and factors, as they may judge proper, in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and likewise at the taking of all examinations and evidence which may be exhibited in the said trial.

Article XXIV.

The United States of America and the Kingdom of Italy mutually engage not to grant any particular favor to other nations, in respect to commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same freely, if the concession was freely made, or on allowing the same compensation if the concession was conditional.

115 Article XXV.

The present treaty shall continue in force for five (5) years from the day of the exchange of the ratifications; and if, twelve (12) months before the expiration of that period, neither of the high contracting parties shall have announced to the other, by an official notification, its intention to terminate the said treaty, it shall remain obligatory on both parties one (1) year beyond that time, and so on until the expiration of the twelve (12) months, which will follow a similar notification, whatever may be the time when such notification shall be given.

Article XXVI.

The present treaty shall be approved and ratified by his Majesty the King of Italy, and by the President of the United States, by

and with the advice and consent of the Senate thereof, and the ratifications shall be exchanged at Washington within twelve months from the date hereof, or sooner if possible.

116 In faith whereof the Plenipotentiaries of the contracting parties have signed the present treaty in duplicate, in the English and Italian languages, and thereto affixed their respective seals.

Done at Florence, this twenty-sixth day of February, in the year of our Lord one thousand eight hundred and seventy-one.

[L. S.] GEORGE P. MARSH.
[L. S.] VISCONTI VENOSTA.

And whereas the said treaty has been duly ratified on both parts, and the respective ratifications of the same were exchanged at Washington on the eighteenth instant:

Now, therefore, be it known that I, Ulysses S. Grant, President of the United States of America, have caused the said treaty to be made public, to the end that the same, and every clause and article thereof, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the City of Washington this twenty-third day of
117 November, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States of America the ninety-sixth.

U. S. GRANT.

[SEAL.]

By the President:
HAMILTON FISH,
Secretary of State.

118 "EXHIBIT No. 1."

No. 149,202. PITTSBURG, PA., *Oct.* 13, 1902.

Ricevuto dal Signor Carmine Mairano
la somma di Lire it. Zrecenyodieci 188
da rimettersi al la Signor a Maria Giuseppa Raffaele di Muchele
Residents in Castelfranci Ufficio gostale di Castelfranci
Provincia di Ovellino
Lire it. $310. ORESTES PASCALE & BRO.

No. 222,876. PITTSBURG, PA., *March* 7, 1903.

Ricevuto dal Sigr. Carmino Maisrano
la som ma di Lire it Venticingue 00–100
per trasmetter la al Sig ra Maria Giuseppa Raffaele
residente in Castelfranci Ufficio Postale di
Provincia di Ovellino a mezzo della Banca Commerciale Italiana, Sede di Genova.
Lire it 25.00. ORESTES PASCALE & BRO.

119 No. 19606. PITTSBURG, PA., *July* 3, 190

Ricevuto dal Sigr. Carmine Maisrano
la somma di Cire it. Venticingue 00–10
per trasmetter la al Sig. Michele Maisrano
residente in Castelfranci
Prov. di Avell
a mezzo della Banca Commercial Italiana, Sede di Genova
Lire it. 25.00.

ORESTES PASCALE & BRO

No. 591. PITTSBURG, PA., *Oct.* 16, 190

Ricevuto dal Sig. Carmine Maisrano
Settecentocinguanta 00–100 Lireit.
da spedirsi al Signor Maria Giuseppa Raffaele
nel Ufficia Postale di Castelfranci a mezzo del Banco di
Napoli, Napoli.
Lit. 750.00.

ORESTES PASCALE & BRO

120 *Copy of Ledger Account.*

Carmine Maiorano Di Michele.

Deposits.				Accounts.			
1902.				Ottob.	13	Asaldo.....	$2
Agosto	30	Dep.....	$20.00	Dicem.	3	Acc.....	
Ottob.	22	Dep.....	29.00	"	29	Acc.....	3
Dicem.	27	Dep.....	23.00	1903.			
1903.				Sett.	5	Acc.....	
Mayo	14	Dep.....	22.00	Ottob.	13	Vaglia 591...	14
Luglio	11	Dep.....	25.00	Dic.	22	Acc.....	2
"	24	Dep.....	30.00	"	22	Prestato.....	
Agosto	3	Dep.....	21.00				
"	21	Dep.....	26.00				$22
"	29	Dep.....	8.00	1904.			
Set.	4	Dep.....	11.00	Feb.	21	Asaldo L. Palmieri	2
"	12	Dep.....	5.00				
Ottobre	10	Dep.....	12.00				
"	31	Dep.....	10.00				
Nov.	21	Dep.....	12.00				
			$254.00				$25

121 *Docket Entries of the Supreme Court, Western District.*

48.

MARIA GUISSEPPA RAFFAELO MAIORANO, Appellant,
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

Appeal from Common Pleas No. 3, Allegheny County, at No. 478, August Term, 1904.

W. H. S. Thomson.
Geo. C. Bradshaw.

Appeal and affidavit filed.
Writ exit January 26, 1906.
Oct. 16, 1906, Record and Ass'g'ts filed.
Oct. 23, 1906, Argued.
Jan. T., 1907, Judgment affirmed. Stewart, J.
Jan. 10, 1907, Petition for Reargument filed and sent to E. D.
Jan. 12, 1907, Reargument refused.
April 22, 1907, Petition for allowance of writ of error filed and *eo die* petition sent to E. D.
April 25, 1907, Writ of Error allowed to Supreme Court of the United States and bond filed in sum of Five Hundred dollars.
May 17, 1907, Bond approved by Mitchell, C. J., and filed.
May 17, 1907, Citation filed with proof of service.
May 17, 1907, Writ of Error attested by Mitchell, C. J., and filed.

122 In the Supreme Court of Pennsylvania for the Western District.

Court of Common Pleas No. 3, County of Allegheny.

No. 478, of August Term, 1906.

MARIA GUISSEPPA RAFFAELO MAIORANO
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

Enter Appeal on behalf of plaintiff from the judgment of the Court of Common Pleas No. 3 of the County of Allegheny.

To George Pearson, Proth'y Sup. Ct. W. D.

GEO. C. BRADSHAW,
Attorneys for Appellant.

COUNTY OF ALLEGHENY, *ss:*

Geo. C. Bradshaw, being duly sworn, saith that the above appeal is not intended for delay, but because Appellant believes she has suffered injustice by the judgment from which she appeals.

GEO. C. BRADSHAW.

Sworn and subscribed before me this 26th day of January A. D 1906.

GEORGE PEARSON,
Prothonotary.

123 No. 48 October Term, 1906. Supreme Court of Pennsylvania Western District. Maria Guisseppa Raffaelo Maiorano *vs.* Baltimore and Ohio R. R. Co. Appeal and Affidavit. Filed Jan. 26, 1906. Supreme Court, W. D. W. H. S. Thomson, Geo. C. Bradshaw, Attorneys for Appellant.

124 *Duplicate Writ.*

COUNTY OF ALLEGHENY, *ss:*

The Supreme Court of Pennsylvania, Western District.

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas No. 3 for the County of Allegheny, Greeting:

We being willing for certain causes to be certified of the matter of the appeal of Maria Guiseppa Raffaelo Maiorano from the judgment of your said court, at No. 478 of August Term, 1904, wherein said appellant is plaintiff and the Baltimore & Ohio R. R. Co. is defendant before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Pittsburgh, in and for the Western District, the fourth Monday of October, 1906, so full and entire as in your Court before you they remain, you certify and send, together with this writ, that we may further cause to be done there-
125 upon that which of right and according to the laws of the said state ought.

Witness the Honorable James T. Mi-chell, Doctor of Laws, Chief Justice of our said Supreme Court, at Pittsburgh, the 26 day of January in the year of our Lord one thousand nine hundred and six.

GEO. PEARSON,
Prothonotary.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

126 To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

S. A. McCLUNG. [L. S.]

478. Aug., 1904. Duplicate Certiorari. No. 48 of October Term, 1906. Supreme Court. Maiorano, Appellant, *vs.* B. & O. R. R. Co.

Certiorari to the Court of Common Pleas No. 3 for the County of Allegheny Returnable the fourth Monday of October, A. D. 1906. Rule on the Appellee to appear and plead on the Return Day of the Writ. Geo. Pearson, Prothonotary. Filed Oct. 16, 1906. Supreme Court, W. D. W. H. S. Thomson, Geo. C. Bradshaw, Attorneys for Appellant. Filed Jan'y 26, 1906.

127 In the Supreme Court of Pennsylvania.

No. 48, October Term, 1906.

MARIA GUISEPPA RAFFAELO MAIORANO
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

Specifications of Error.

1st. The learned court erred in entering a judgment of compulsory non suit.

2nd. The learned court erred in refusing plaintiff's motion to take off judgment of compulsory non suit entered in this case.

3rd. The learned court erred in refusing to hold that under and by virtue of a treaty existing between the King of Italy and the Government of the United States, proclaimed on November 23, 1871, that plaintiff had a right to recover even though the evidence showed that she was at the time of the death of plaintiff's husband, and is now, a non resident alien.

GEO. C. BRADSHAW,
Attorney for Appellant.

128 No. 48, October Term, 1906. Maria Guiseppa Raffaelo Maiorano *vs.* Baltimore & Ohio Railroad Company. Specifications of error. Filed Oct. 16, 1906. Supreme Court, W. D. Geo. C. Bradshaw, Thomson & Thomson Attorneys at Law, Bakewell Building, Pittsburgh.

129 In the Supreme Court of Pennsylvania, Western District.

No. 48, October Term, 1906.

MARIA GUISEPPA RAFFAELO MAIORANO
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY

Appeal, C. P. No. 3, All'y Co.

Filed January 7, 1907.

STEWART, *J.:*

A single fact not appearing, and of course not considered, in the case of Deni *v.* P. R. R. Co., 181 Pa. St., 525, is relied upon to dis-

tinguish this case from that, and exempt it from the operation of the rule there declared. That case expressly decides that a non resident alien has no standing to maintain an action under the Act of 26th April, 1855, for the recovery of damages for injury to another causing death. There, as here, the party claiming the right of action was a non resident alien; the citizenship in both cases being in the Kingdom of Italy. The fact not disclosed in that case and appearing in this is, the existence of a treaty between the United States and the Kingdom of Italy, whereby certain reciprocal
130 rights in the citizens of the several countries are agreed upon and established. Article III of this treaty provides as follows: "The citizens of each of the high contracting parties shall receive in the States and Territories of the other the most consistent protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives on their submitting to the conditions imposed upon the natives." It is unnecessary for present purposes to recite other parts of the treaty, since whatever appears elsewhere upon this particular question, is mere matter of detail or amplification. If the plaintiff has the right here contended for it must be derived from the article above recited.

By express constitutional provision a treaty entered into between the United States and any foreign power, is supreme law. The constitution further declares with respect to it, "the judges in every state shall be bound thereby, anything in the constitution of any state to the contrary notwithstanding." When by such treaty, rights are conferred of a nature to be enforced in a court of justice, the court resorts to the treaty for the rule of decision as it would to a legislative enactment. Head Money Cases, 112 U. S. 580. It is frequently necessary in cases of this kind for courts to ascertain
131 by construction the meaning intended to be conveyed by the terms used, and the application of the stipulations of the treaty to particular cases. U. S. *v.* Rauscher, 119 *Id.*, 407. Scharpf *v.* Schmidt, 173 Ill. 255. In construing a treaty the general rule obtains that the court is to be guided by the intention of the parties, and if the words clearly express the meaning and intention no other means of interpretation can be employed. Ware *v.* Hilton, 3 Dall. (U. S.) 199.

These principles are to be observed in determining the question before us—does the stipulation on the part of the United States, that the citizens of Italy in our states and territories shall enjoy, in the protection and security of their persons and property, the same rights which our own citizens enjoy, confer upon the plaintiff the right to recover in an action at law under the provisions of the statute of 26th April 1855, for the death of her husband? While the treaty stipulates for reciprocal rights, we may for convenience here, consider it as a covenant engagement by the United States. The rights granted have regard solely to the protection and security of persons and property, and are such as our own citizens enjoy in connection therewith. These rights are ordinarily incident to, but do
132 not constitute citizenship. While the treaty by its terms includes the entire citizenship of Italy, it is obvious that its pro-

visions can avail those only, who either with respect to their persons or property are within the jurisdiction of the United States. With respect to the particular rights conferred, the treaty places those citizens of Italy who bring their persons or property within the covenant relation, upon an exact equality with our own citizens for the time being. Upon withdrawal of persons or property from the jurisdiction of the United States, the rights cease; for in that case they have nothing to operate upon. The plaintiff is a resident of Italy, and so far as appears, has never been within the limits of the United States nor has she at any time had property subject to its laws. Her husband, for whose death she claims to recover, was not a citizen of the United States, but had brought himself into the covenant relation with the United States by coming here. While here he met his death in a collision on the defendant's railroad. There can be no question as to the extent of his rights. Had he survived the accident he could have maintained an action against the railroad company for the recovery of compensatory damages. His subsequent death would not have abated the action; it would have survived to his personal
133 representatives to the use of the beneficiaries indicated in the Act. The foundation for such action would be the injury and loss the party himself had suffered, and the action would be in his own right. This is the full measure of the right which under similar circumstances would belong to one of our own citizens. At common law the death of a human being could not be complained of as an injury in a civil court, and therefore could not be made the ground of an action for damages. While the statute allows such action at the suit of husband, widow, children or parents, the action is not for the enforcement of any right which was in the party killed, but for a wholly distinct cause not affecting in any way the estate or rights of such party; it is exclusively for such damages as the parties plaintiff in the action have sustained by reason of the *the* death. As was said in P. R. R. Co. *v.* Zerbe, 33 Pa. St., 318, this latter is a new and independent right given by positive laws—not cast upon the parties to whom the statute gives it by survivorship as for injury done the decedent, but it is for the wrong done to them as individuals. The measure of damages allowed in such cases is but another expression of the same truth; the damages are limited to the pecuniary value of the life lost to those who sue; indi-
134 dicating clearly that the right to sue is not as though it came by succession as the right to recover what belonged to the party killed, but an independent cause of action for damages sustained by those who are allowed to bring the action.

What we have said sufficiently indicates the difference between the rights of the plaintiff and those of her husband, and the ground upon which the distinction is based. The injury for which plaintiff sues is her own peculiar injury resulting from the death of her husband, and not for injuries he received. A statute right is given our citizens in such case, but plaintiff, as we have seen, with respect to any such claim is not within any treaty privileges, but is simply an alien. This being the case the doctrine of Deni *v.* P. R. Co. applies, and it results that a non suit was properly ordered.

The judgment is affirmed.

135 COMMONWEALTH OF PENNSYLVANIA, *County of Allegheny, sct:*

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Western District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Maiorano *v.* Baltimore & Ohio R. R. Co. at No. 48, October Term, 1906, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in the County of Allegheny, in the said Western District of Pennsylvania, this 17th day
136 of January in the year of our Lord One Thousand Nine Hundred and seven.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEO. PEARSON,
Prothonotary.

137 No. 478, Aug. T., 1904. No. 48, October Term, 1906. Maria G. R. Maiorano *vs.* Baltimore & Ohio R. R. Co. Exemplification. Filed Jan'y 19, 1907.

138 No. 48, October Term, 1906.

MARIA GUISEPPA RAFF-ELO MAIORANO
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

To the Honorable the Justices of the Supreme Court of the State of Pennsylvania:

Maria Guiseppa Raff-elo Maiorano, appellant in the above stated case, by her counsel, G. C. Bradshaw, respectfully petitions your Honorable Court for a re-argument of the above stated case, for the following reasons:

1. That counsel may present to your Honors his reasons for believing that the doctrine of the Court, construing the statute of 1855, as announced in the case of Deni *v.* Penna. Railroad Company, 181 Pa., 525, should be overruled, this not having been argued before your Honors at the hearing in this case.

2. For the further reason that counsel may present to your Honors his reasons for believing that the pecuniary interest or right of a wife in her husband's life, and the right to bring a suit for damages on account of his death is a property right, and within the
139 provision of the treaty with Italy which protects the property rights of the plaintiff.

Your petitioner further prays that your Honorable Court may order the Prothonotary of the Supreme Court to retain the record in this case until this petition for reargument is disposed of by your Honorable Court.

And your petitioner will ever pray, etc.

MARIA GUISEPPA RAFF-ELO MAIORANO,
By GEO. C. BRADSHAW, *Attorney.*

140 Supreme Court of Penna. No. 48, October Term, 1906. Page 44. Maria Guiseppa Raff-elo Maiorano *vs.* Baltimore & Ohio Railroad Company. Petition for Re-argument and for order to hold record. Jan'y 12, 1907, re-argument refused. *Per Cur.* Filed Jan'y 10, 1907. Supreme Court W. D. G. C. Bradshaw, Bakewell Bldg., Pittsburgh, Pa.

141 The Supreme Court of Pennsylvania, Western District, County of Allegheny, *ss:*

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas No. 3 for the County of Allegheny, Greeting:

Whereas, By virtue of our Writ of Certiorari to No. 48 October Term, 1906, of our court, a record in the matter of the appe*la* of Maria G. R. Maiorano from the judgment of your said court at No. 478 of August Term, 1906, was brought into our said court, and the said cause was there so proceeded in that on the 7th day of January A. D. 1907, the following decision was rendered, viz:

Judgment affirmed. Stewart, J.

Wherefore, We hereby remit you the record aforesaid with the proceedings thereon, and all things touching the same, so far
142 as in this Court they remain, for the purpose of execution as to justice shall appertain, in accordance with the decision of our said Supreme Court as aforesaid.

Witness the Honorable James T. Mitchell, Doctor of Laws, Chief Justice of our said Supreme Court, at Pittsburgh, the 17th day of Jan'y in the year of our Lord one thousand nine hundred and seven.

GEO. PEARSON,
Prothonotary.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

143 No. 478, Aug. Term, 1905. No. 48, October Term, 1906. Supreme Court. M. G. R. Maiorano, Appellant *vs.* B. & O. R. R. Co. Remittitur. Filed Jan'y 19, 1907.

144 *Supplemental Certiorari.*

The Supreme Court of Pennsylvania, Western District, Count
of Allegheny, *ss.:*

The Commonwealth of Pennsylvania to the Judges of the Court
Common Pleas No. 3 for the County of Allegheny, Greeting:

We being willing for certain further proceedings in the Supren
Court in the matter of appeal of Maria Guisseppa Raffaelo Maioran
from the judgment of your said court, at No. 478 of August Tern
A. D. 1904, wherein the above named Appellant is Plaintiff and th
Baltimore and Ohio Railroad Company, is defendant before you,
some of you, depending, do command you, that the record and pr
ceeding- aforesaid, with all things touching the same, before th
Justices of our Supreme Court of Pennsylvania, at a Supreme Cou
to be holden at Pittsburgh, in and for the Western District, fortl
with so full and entire as in your Court before you they remain, yo
certify and send, together with this Writ, that we may furth
145 cause to be done thereupon that which of right and accordin
to the laws of the said State ought, as provided in section 1
of Act approved 19 May, 1897, P. L. 67.

Witness the Honorable James T. Mitchell Doctor of Laws, Chi
Justice of our said Supreme Court, at Pittsburgh, the twentieth day
April in the year of our Lord one thousand nine hundred and seve

[Seal of the Supreme Court of Pennsylvania,
Western District, 1776.]

GEO. PEARSON,
Prothonotary.

146 *Supplemental Certiorari.*

In the Supreme Court of Pennsylvania for the Western District.

No. 478, August Term, 1906.

MARIA GUISSEPPA RAFFAELO MAIORANO, Appellant,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY.

Court of Common Pleas No. 3, County of Allegheny.

Issue Certiorari to the Court of Common Pleas No. 3 of the Count
of Allegheny to remove the record and proceedings in a certain actio
in the said Court at above number and term between the parti
hereinbefore recited. The record aforesaid being required by th
Superior Court for further proceedings therein, as provided by Se
tion 18 of the Act approved 19 May, 1897, P. L. 67.

GEO. C. BRADSHAW,
Attorney for Plaintiff.

To George Pearson, Prothonotary Supreme Court, Western Distri

147 No. 48, October Term, 1906. Supreme Court of Pennsylvania Western District. Maria Guisseppa Raffaelo Maiorano Appellant *vs.* Baltimore & Ohio Railroad Company. Præcipe for certiorari. George C. Bradshaw, Attorney for Appellant.

148 To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

—— ——. [L. S.]
—— ——. [L. S.]

No. 478, Aug. Term, 1904. No. 48 of October Term, 1906. Supreme Court. Maria Guisseppa Raffaelo Maiorano Appellant *vs.* Baltimore & Ohio R. R. Co. Supplemental Certiorari to the Court of Common Pleas No. 3 for the County of Allegheny Returnable forthwith. Rule on the Appellee to appear and plead on the Return Day of the Writ. Geo. Pearson, Prothonotary. W. H. S. Thomson, George C. Bradshaw, Attorneys for Appellant. Filed April 22, 1907.

149 *Petition for Writ of Error.*

In the Supreme Court of Pennsylvania, Western District.

No. 48, October Term, 1906.

MARIA GIUSEPPA RAFFAELA MAIORANO
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY.

To the Honorable James T. Mitchell, Chief Justice of the Supreme Court of Pennsylvania:

The Petition of Maria Giuseppa Raffaela Maiorano, plaintiff in the above stated case, by her attorney, George C. Bradshaw, respectfully showeth:

First. That said plaintiff did, at No. 478 August Term, 1906, in the Court of Common Pleas No. 3 of Allegheny County, Pennsylvania, bring an action in trespass against the said Baltimore & Ohio Railroad Company, defendant, and that at the trial of said
150 action, the said court did enter a compulsory non-suit against plaintiff which, upon motion, said Court subsequently refused to take off.

Second. That your petitioner, at No. 48 October Term, 1906, duly appealed from the decision of the said Court of Common Pleas No. 3 of Allegheny County, to the Honorable, the Supreme Court of the State of Pennsylvania, and that the said Supreme Court of Pennsylvania did, on the 7th day of January, 1907, file an opinion in said case affirming the decision of the lower court.

Third. That as appears by the opinion of the lower Court, the de cision of the said lower Court was based upon the construction and interpretation of a certain treaty entered into between the United States of America and the King of Italy, and ratified on November 18, 1871, and that as will more fully appear by the opinion of the Honorable, the Supreme Court of Pennsylvania, the decision of the said lower Court was affirmed and that the said treaty was construed against the contention of the plaintiff, and that the rights claimed under the provisions of said treaty by said plaintiff, were denied by the decision of the said Supreme Court of the State of Pennsylvania as will more fully appear by the opinion of the said Supreme Court hereto attached and made part of this petition.

Fourth. That the sole question involved and decided in
151 the above stated case, concerns the construction and applica tion of the aforesaid treaty, and that said construction and application has been against a right and privilege claimed by your petitioner, and that said decision so rendered is by the highest court of the State of Pennsylvania and is final.

Fifth. Your petitioner avers that the decision and judgment of the Supreme Court of Pennsylvania, is in violation of the rights guaranteed to your petitioner by the provisions of said treaty, and is in special violation of Article two (2), Article Three (3), Article Twenty-two (22), Article Twenty-three (23) and Article Twenty-four (24) of said treaty.

Your petitioner therefore prays for the allowance of a writ of error to the Supreme Court of Pennsylvania in order that the judgment of the said court may be re-examined and reversed or affirmed in the Supreme Court of the United States.

And she will ever pray.

Assignment of errors hereto attached.

MARIA GUISEPPA RAFFAELO MAIORANO,
By GEORGE CALVERT BRADSHAW, *Attorney.*

152 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

On this 22nd day of April, A. D., 1907, before me, the subscriber personally came George C. Bradshaw, Attorney and agent for the petitioner in this behalf, who, being duly sworn according to law deposes and says that the above petition is not presented for the purpose of delay, but because petitioner believes that injustice has been done her and that all the facts set forth in said petition are true and correct to the best of his knowledge and belief.

GEORGE C. BRADSHAW.

Sworn and subscribed before me this 22nd day of April, A. D. 1907.

[Seal of the Supreme Court of Pennsylvania,
Western District, 1776.]

GEO. PEARSON,
Prothonotary.

153 In the Supreme Court of Pennsylvania, Western District.

No. 48, October Term, 1906.

MARIA GUISEPPA RAFFAELO MAIORANO
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY.

Assignment of Errors.

Now comes the above plaintiff and files herewith her petition for writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

The Supreme Court of Pennsylvania erred in holding and deciding that the plaintiff was not entitled to recover in the above entitled case under and by virtue of a certain treaty entered into between the United States of America and the King of Italy, ratified April
154 29, 1871. The contention of the plaintiff that she was entitled to maintain her action under and by virtue of the provisions of said treaty, particularly Article 2, Article 3, Article 22, Article 23, and Article 24 of said treaty, were denied and refused by the said Supreme Court of Pennsylvania in the above case.

Said errors are more particularly set forth as follows:

The Supreme Court of Pennsylvania erred in holding and deciding:

First. That under and by virtue of Article 3 of said treaty, the said plaintiff was not entitled to maintain her said action in the Courts of Pennsylvania in the same manner as if she were a native of the State of Pennsylvania and of the United States.

Second. That Article 2 and Article 3 of said treaty did not entitle plaintiff to recover and maintain her said action in the same manner as if she and her deceased husband, had been native citizens of the State of Pennsylvania and of the United States.

Third. Under the provisions of Article 23 of said treaty, said plaintiff was not entitled to free access to the Courts of Justice in the State of Pennsylvania to maintain the same actions and entitled to the same rights as if she were and her deceased husband had
155 been native citizens of the State of Pennsylvania, and of the United States.

Fourth. Said Supreme Court of Pennsylvania erred in not reversing the decision of the Court of Common Pleas No. 3 of Allegheny County.

Fifth. Said Supreme Court of Pennsylvania erred in not sustaining plaintiff's motion to take off the judgment of compulsory non-suit entered in said case and remanding said case for a new trial.

For which errors the said plaintiff prays that the judgment of the said Supreme Court of Pennsylvania, dated the 7th day of January, 1907, be reversed; that the non-suit entered in the above stated case

be taken off and that the cause be remanded for a new trial, and t
the costs of this appeal be paid by defendant.

GEO. C. BRADSHAW,
Attorney for Plaintiff

156 No. 48, October Term, 1906. In the Supreme Court
Pennsylvania Western District. Maria Giuseppa Raffa
Maiorano *vs.* The Baltimore and Ohio Rd. Co. Petition for Wri
Error. April 25, 1907, Let the writ of error issue upon the exe
tion of a bond by petitioners to the Commonwealth of Pennsylva
for use of the Baltimore & Ohio Railroad Co., in the sum of F
Hundred dollars. James T. Mitchell, Chief Justice of the Supre
Court of Pennsylvania. Filed April 22, 1907, Supreme Court W.
George C. Bradshaw 1351-7 Frick Bldg. Annex, Pittsburgh, Pa.

157 UNITED STATES OF AMERICA, *ss:*

[Seal of the U. S. Circuit Court, W. D. Penna.]

The President of the United States of America to the Honora
the Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition
the judgment of a plea which is in the said Supreme Court of Pe
sylvania before you, or some of you, being the highest court of l
or equity of the said State in which a decision could be had in
said suit between Maria Guiseppa Raffaela Maiorano, plaintiff, a
The Baltimore & Ohio Railroad Company, defendant, wherein
drawn in question the validity of a treaty or statute of, or an auth
ity exercised under, the United States, and the decision was agai
their validity; or wherein was drawn in question the validity o
statute of, or an authority exercised under, said State, on the grou
of their being repugnant to the Constitution, treaties, or laws of
United States, and the decision was in favor of such their validi
or wherein was drawn in question the construction of a cla
158 of the Constitution, or of a treaty, or statute of, or commiss
held under the United States, and the decision was agai
the title, right, privilege, or exemption specially set up or clain
under such clause of the said Constitution, treaty, statute, or comm
sion; a manifest error hath happened to the great damage of
said plaintiff as by her complaint appears. We being willing t
error, if any hath been, should be duly corrected, and full and spe
justice done to the parties aforesaid in this behalf, do command
if judgment be therein given, that then under your seal, distin
and openly, you send the record and proceedings aforesaid, with
things concerning the same, to the Supreme Court of the Un
States, together with this writ, so that you have the same in the
Supreme Court at Washington, within thirty days from the
hereof, that the record and proceedings aforesaid being inspe
the said Supreme Court may cause further to be done therein to
rect that error, what of right, and according to the laws and cust
of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of May, in the year of our Lord one thousand nine hundred and seven.

[Seal of the U. S. Circuit Court, W. D. Penna.]

H. D. GAMBLE,
Clerk of the Circuit Court of the United States, at Pittsburgh, Penna.

Allowed by

JAMES T. MITCHELL,
Chief Justice of the Supreme Court of Pennsylvania.

[Endorsed:] Filed May 17, 1907. Supreme Court, W. D.

159 UNITED STATES OF AMERICA, *ss*:

To Baltimore & Ohio Railroad Company, Defendant, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within Thirty days from the date hereof, persuant to a writ of error, filed in the clerk's office of the Supreme Court of Pennsylvania, wherein Maria Guisseppa Raffaelo Maiorano is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James T. Mitchell, Chief Justice of the Supreme Court of Pennsylvania, this sixteenth day of May, in the year of our Lord one thousand nine hundred and seven.

JAMES T. MITCHELL,
Chief Justice of the Supreme Court of Pennsylvania.

On this sixteenth day of May, in the year of our Lord one thousand nine hundred and seven, personally appeared before me, the subscriber, George C. Bradshaw, and makes oath that he delivered a true copy of the within citation to John S. Wendt, of Messrs. McCleve & Wendt, counsel of record for the Baltimore & Ohio Railroad Company, Defendant.

GEO. C. BRADSHAW.

Sworn to and subscribed the 17th day of May, A. D. 1907.

[Seal of the Supreme Court of Pennsylvania, Western District, 1776.]

GEO. PEARSON,
Proth'y Supreme Court Penna., W. D.

[Endorsed:] Filed May 17, 1907. Supreme Court, W. D.

160 Know all men by these presents, That we, Maria Guiseppa Raffaelo Maiorano, as principal and Otto S. Floing and J. W. Bailie, are held and firmly bound unto Commonwealth of Pennsylvania, for use of Baltimore and Ohio Railroad Company in the full and just sum of five hundred ($500.00) dollars to be paid to the said Commonwealth of Pennsylvania, for use of Baltimore and Ohio Railroad Company, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of May, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a session of the Supreme Court of Pennsylvania, in a suit depending in said Court, between Maria Guiseppa Raffaelo Maiorano, Plaintiff, and Baltimore and Ohio Railroad Company, defendant a judgment of compulsory non-suit was rendered against the said Maria Guiseppa Raffaelo Maiorano plaintiff— having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Baltimore and Ohio Railroad

161 Company, Defendant, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now the condition of the above application is such, that if the said Maria Guiseppa Raffaelo Maiorano, Plaintiff, shall prosecute her writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

MARIA GUISEPPA RAFFAELA MAIORANO,
By GEO. C. BRADSHAW, *Her Attorney.* [SEAL.]
OTTO S. FLOING. [SEAL.]
J. W. BAILIE. [SEAL.]

Sealed and delivered in presence of
CALVERT BRADSHAW.

Approved by
JAMES T. MITCHELL,
Chief Justice of the Supreme Court of Pennsylvania.

162 STATE OF PENNSYLVANIA, *County of Allegheny, ss:*

Otto S. Floing and J. W. Bailie being each duly sworn on oath depose and say: We are each of lawful age and are citizens of the State of Pennsylvania and of the United States, and know the contents of the aforegoing instrument to which we have attached our names. We each for himself say, we are worth the sum of Five Hundred ($500) dollars over and above all debts, liabilities and exemptions.

OTTO L. FLOING.
J. W. BAILIE.

Subscribed to and sworn to before me this 11th day of May, A. D. 1907.

CALVERT BRADSHAW,
Notary Public.

My Commission Expires January 16th 1909. [SEAL.]

163 Supreme Court of Pennsylvania. No. 48, October Term, 1906. Maria Guiseppa Raffaelo Maiorano *vs.* Baltimore & Ohio Railroad Company. Bond for appeal from the Supreme Court of Pennsylvania to the Supreme Court of the United States. Filed May 17, 1907. Supreme Court, W. D. George C. Bradshaw, 1351–7 Frick Building Annex, Pittsburgh, Pa.

164 *Certificate of Record.*

COMMONWEALTH OF PENNSYLVANIA, *County of Allegheny, ss:*

I, George Pearson, Prothonotary of The Supreme Court of Pennsylvania, for the Western District thereof, do hereby certify that the foregoing Record, pages 1 to —— inclusive, is a true and faithful copy of the Record and Proceedings of The Supreme Court of Pennsylvania, in the Western District aforesaid, in a certain suit therein pending, wherein Maria Guisseppa Raffaelo Maiorano is appellant and The Baltimore & Ohio Railroad Company is appellee.

In testimony whereof I have hereunto set my hand and affixed the Seal of the said The Supreme Court of Pennsylvania, in and for the Western District, at Pittsburgh, this twentieth day of May in the year of — Lord one thousand nine hundred and seven.

[Seal of the Supreme Court of Pennsylvania,
Western District, 1776.]

GEO. PEARSON,
Prothonotary.

165 I, James T. Mitchell, Chief Justice of The Supreme Court of Pennsylvania, do certify, that George Pearson was at the time of signing the annexed attestation and now is Prothonotary of the said The Supreme Court of Pennsylvania, in and for the Western District, to whose acts as such full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this twentieth day of May in the year of our Lord one thousand nine hundred and seven.

JAMES T. MITCHELL.

I, George Pearson, Prothonotary of The Supreme Court of Pennsylvania in and for the Western District, do certify, that the Honorable James T. Mitchell by whom the foregoing Certificate was made and given, was at the time of making and giving the same and is now Chief Justice of The Supreme Court of Pennsylvania; to whose

acts as such full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said The Supreme Court of Pennsylvania, in and for the Western District, at Pittsburgh, this twentieth day of May in the year of our Lord one thousand nine hundred and seven.

[Seal of the Supreme Court of Pennsylvania,
Western District, 1776.]

GEO. PEARSON,
Proth'y Supreme Court Penna., Western District.

Endorsed on cover: File No. 20,753. Pennsylvania Supreme Court. Term No. 103. Maria Guiseppa Raffaela Maiorano, plaintiff in error, *vs.* The Baltimore & Ohio Railroad Company. Filed June 5th, 1907. File No. 20,753.

Office Supreme Court, U. S.
FILED.
NOV 25 1908
JAMES H. McKENNEY,
CLERK.

NO. 103.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

MARIA GUISEPPA RAFFAELA MAIORANO,
PLAINTIFF IN ERROR.

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

BRIEF OF PLAINTIFF IN ERROR

GEORGE CALVERT BRADSHAW,
WILLIAM HENRY SEWARD THOMSON,
WALTER V. R. BERRY,
Counsel for Plaintiff in Error.

THE JACKSON PRINTING CO., 341 SECOND AVE., PITTSBURG.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

MARIA GUISEPPA RAFFAELA MAIORANO, Plaintiff in Error.
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.
No. 103.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF OF PLAINTIFF IN ERROR.

HISTORY OF THE CASE.

The plaintiff's husband, Carmine Maiorano, was killed in a collision which occurred on the road of the defendant company on the night of December 23, 1903, at a point called Laurel Run, near the town of Connellsville, in the State of Pennsylvania. This action was brought by the widow of decedent, Maria Maiorano, to recover damages for the death of her husband on behalf of herself and her two children.

The plaintiff alleges in her statement that she is a resident of Castlefranco, in the Province of Italy, and is a subject of the King of Italy, and that defendant is a corporation operating a line of railroad within the Commonwealth of Pennsylvania. At the trial she proved the accident was caused by a collision due to logs or boards that had fallen on the tracks over which the train was running; that the engine ran into the boards and overturned, and that plaintiff's husband was among the dead taken out after the accident. She showed that her husband had been properly identified after the accident by witnesses who knew him, by letters and marks on his person; she showed that he was a passenger on the train and that a ticket over the lines of the Baltimore and Ohio had been found on his person. She proved that she was his wife, that he had lived constantly with her in Italy, and that since he had been a resident of the United States he had supported her by sending her money, the amount of which was disclosed in the evidence. She showed that he was of the age of twenty-five years and of sober and industrious habits. She also offered in evidence a treaty between the United States Government and the King of Italy, ratified November 23, 1871. The Court entered a compulsory non-suit, on the ground that the evidence of plaintiff disclosed that she was a non-resident alien at the time of the accident and at the time of the bringing of this suit; and held that she could not maintain this action in the State of Pennsylvania, nor under any of the provisions of the treaty between the King of Italy and the Government of the United States.

Plaintiff made a motion to take off the judgment of compulsory non-suit, which, after argument, the Court refused to do, to which motion counsel for plaintiff excepted, and bill was sealed. From the judgment of the Court refusing to take off the judgment of compulsory non-suit an appeal was taken to the Supreme Court of Pennsylvania, which Court affirmed the judgment of the lower

Court. To review this judgment, the writ of error was sued out.

The questions that are raised by this appeal are, whether or not, under the provisions of the treaty with Italy, the plaintiff has a right to recover damages for the death of her husband, and whether or not this treaty, when properly interpreted, is intended to extend the scope of the Pennsylvania Statutes of 1851 and 1855. The Pennsylvania Court held that the plaintiff could not recover for her husband's death under the Pennsylvania Fatal Accidents Act, and refused to entertain the contention of plaintiff that the benefit of these Acts has been extended to her by the treaty of 1871.

ASSIGNMENTS OF ERROR.

Now comes the above plaintiff and files herewith her petition for writ of error, and says that there are errors in the records and proceedings of the above entitled case: and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

The Supreme Court of Pennsylvania erred in holding and deciding that the plaintiff was not entitled to recover in the above entitled case by virtue of a certain treaty entered into between the United States of America and the King of Italy, ratified April 29, 1871. The contention of the plaintiff that she was entitled to maintain her action under and by virtue of the provisions of said treaty, particularly Article 2, Article 3, Article 22, Article 23 and Article 24 of said treaty, was denied and refused by the said Supreme Court of Pennsylvania in the above case.

Said errors are more particularly set forth as follows:

The Supreme Court of Pennsylvania erred in holding and deciding:

First—That under and by virtue of Article 3 of said treaty, the said plaintiff is not entitled to maintain her said action in the Courts of Pennsylvania, in the same manner as if she were a native of the State of Pennsylvania, and of the United States.

Second—That Article 2 and Article 3 of said treaty does not entitle plaintiff to recover and maintain her said action in the same manner as if she and her deceased husband had been native citizens of the State of Pennsylvania and of the United States.

Third—That under the provisions of Article 23 of said treaty, said plaintiff is not entitled to free access to the Courts of Justice in the State of Pennsylvania to maintain the same actions and entitled to the same rights as if she were and her deceased husband had been native citizens of the State of Pennsylvania, and of the United States.

Fourth—Said Supreme Court of Pennsylvania erred in not reversing the decision of the Court of Common Pleas No. 3 of Allegheny County.

Fifth—Said Supreme Court of Pennsylvania erred in not sustaining plaintiff's motion to take off the judgment of compulsory non-suit entered in said case and remanding said case for a new trial.

For which errors the said plaintiff prays that the judgment of the said Supreme Court of Pennsylvania, dated the 7th day of January, 1907, be reversed; that the non-suit entered in the above stated case be taken off; that the cause be remanded for a new trial, and that the cost of this appeal be paid by defendant.

ARGUMENT.

I.

THE HISTORY OF THE STATUTORY ACTION FOR DEATH IN THE STATE OF PENNSYLVANIA.

At common law there was no action given to any person for death caused by wrongful act in the State of Pennsylvania, but this was altered by the Act of April 15th, 1851, P. L. 669, par. 18 and 19, which provides as follows:

> "No action hereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of the plaintiff, but the personal representatives of the deceased may be substituted as plaintiff and prosecute the suit to final judgment and satisfaction.
>
> "Whenever death shall be occasioned by unlawful violence or negligence and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for the recovery of damages for the death thus occasioned."

This Act was amended by another Act passed April 26th, 1855, P. L. 309, par. 1, which provides as follows:

> "The persons entitled to recover damages for any injury causing death shall be the husband, widow, children or parents of the deceased, and no other relative, and the sum recovered shall go to them in the proportion that they would take his or her personal estate in case of intestacy, and that without liability to creditors. The declaration shall state who are the parties entitled in such action. The action shall be brought within one year after the death, and not thereafter."

Since the passage of the above Acts by the Legislature, a new Constitution has been adopted in the State of Pennsylvania, which contains the following:

ARTICLE 3, SECTION 21.

> "No Act of the General Assembly shall limit the amount to be recovered for injuries resulting in death or for injuries to persons or property, and in case of death from such injuries the right of action shall survive and the General Assembly shall prescribe for whose benefit such action shall be prosecuted. No Act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes different from those fixed by general law regulating actions against injured persons and such Acts now existing are avoided."

The Supreme Court of Pennsylvania in *Knight vs. West Jersey Railrod Company, 108 Pa., 250,* held that the

Courts of Pennsylvania would enforce the statute of another State, giving an action for wrongful death, where that statute was similar in purpose and effect to the above statutes of Pennsylvania, applying the doctrine of this Court in *Dennick vs. Pennsylvania Railroad Company, 103 U. S., 11.* In that case Mr. Justice Trunkey, speaking for the Court, said:

> "The general rule is, as to personal torts which give a right of action at common law, that the action may be brought wherever the wrongdoer may be found, and jurisdiction of his person may be obtained. In actions ex contractu, their transitory character and the jurisdiction of the Court to entertain them, are the same whether the right be given by statute or the common law. Like rule has recently been applied in Minnesota in an action ex delicto, the Court remarking that where either by common law or statute a right of action has become fixed and legal liability incurred, if transitory, it may be enforced in the Courts of any State which can obtain jurisdiction of the defendant, provided it is not against the public policy or the laws of the State where it is sought to be enforced. The statute of another State has no extra territorial force, but rights under it will always, in comity, be enforced, if not against the policy of the laws of the forum. In such cases the law of the place where the right was acquired or the liability was incurred, will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought."

Herrick vs. Minneapolis & St. L Railway Co. 23 Amer. L. Reg., 26. The doctrine in that case has been enunciated in *Dennick vs. Railroad Co., 103 U. S., 11.*

In the case of *Deni vs. Pennsylvania Railroad Co., 181 Pa., 521*, the Pennsylvania Courts laid down the doctrine that the above statutes in Pennsylvania did not apply for the benefit of a non-resident alien. In this case the Court, in construing the statutes, said:

> "Our statute was not intended to confer upon non-resident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our citizens to be discharged for their benefit. It has no extra territorial force, and the plaintiff is not within the purview of it. While it is possible that the language of the statute may admit of a construction which would include non-resident alien husbands, widows, children and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we cannot adopt it."

By this decision it will be seen that the plaintiff in error was denied her right of action because she is a non-resident alien, and because the statute of 1855 was interpreted by the Supreme Court not to include her within its scope.

II.

EFFECT OF UNITED STATES TREATY WITH ITALY UPON THE PENNSYLVANIA STATUTES.

We wish to make clear, at the outset of this case, the position of plaintiff in error with respect to the Pennsyl-

vania Statute generally known as the "Fatal Accidents Act" and to the treaty with Italy. We do not contend that the Pennsylvania Statute is void because it conflicts with any provision of this treaty. We do not contend that there is any repugnancy between the Pennsylvania Statute and the treaty. On the contrary, our claim to recover is based not alone upon the treaty, but upon the treaty and the Pennsylvania Statute together; and our contention is that the error committed in the Pennsylvania Court was by wrongly interpreting the meaning of this treaty and its effect upon the Pennsylvania law.

The Legislature of Pennsylvania might have extended to aliens the same right to recover in cases of wrongful negligence causing death that were given by the Acts of 1851 and 1855 to citizens of that State. But, while the words of the Statute are broad enough to include aliens, as well as citizens, the interpretation of that Statute by the Pennsylvania Supreme Court *(Deni vs. P. R. R., 181 Pa., 521)* denies the action. But the Legislature of Pennsylvania is not the sole power under our form of government invested with the right to confer benefits and privileges upon aliens. This may be done as effectively, and perhaps as extensively, by the Federal Government under the treaty-making power conferred upon it by the Constitution of the United States. We need not cite cases to show how absolute and supreme are the rights of aliens when granted by treaty. They may be enforced even as against hostile State legislation ,and may be granted by treaty as securely as if granted by the Legislature itself. The supremacy of rights under a treaty is effectively secured from State enactments by the Constitution itself. Article 6 provides:

> "The Constitution and laws of the United States and all treaties made or what shall be made under

the authority of the United States shall be the supreme law of the land and the Judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

This provision of the Federal Constitution has been enforced many times by the decisions of this Court. *Hauenstine vs. Lynnham, 100 U. S., 483; Weir vs. Hilton 3 Dall., 203; DeGoeffry vs. Riggs, 133 U. S., 258; Yick Wo vs. Hopkins, 118 U. S., 356.*

The plaintiff in error set up and claimed in the Pennsylvania Court that the benefits of the Acts of Assembly of Pennsylvania of 1851 and 1855 are, by the treaty with Italy enacted in 1871, expressly granted to her. By a proper interpretation of that treaty, she claims that the scope of the Statutes of Pennsylvania is enlarged so as to confer the benefits of the Pennsylvania law upon her; and that the true interpretation and meaning of the treaty is, that all the benefits and rights to recover given by those Statutes to citizens of Pennsylvania are by virtue and force of the treaty intended to be conferred upon the citizens of Italy. In short, her contention is, that the treaty, when rightly construed, acts upon the Pennsylvania Statutes of 1851 and 1855 in the same way and to the same effect as if the Legislature of that State had amended those Statutes so as to include Italian subjects within the scope of their provisions.

III.

PARTICULAR ARTICLES OF TREATY IN QUESTION.

The special Articles of the treaty with Italy under which plaintiff in error claims a right to recover in this

action, are Article 2, Article 3 and Article 23, quoted as follows:

ARTICLE 2.

"The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do everything incident to, or necessary for trade, upon the same terms as the natives of the country, submitting themselves there to the law established."

ARTICLE 3.

"The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are, or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

ARTICLE 23.

"The citizens of either party shall have free access to the Courts of Justice, in order to maintain and defend their own rights, without any other conditions, restrictions, or taxes, than such as are imposed upon the natives. They shall therefore be free to employ, in defense of their rights, such advocates solicitors, notaries, agents and factors as they may judge proper, in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and likewise, at the taking of all examinations and evidences which may be exhibited in the same trials."

IV.

PURPOSE AND EFFECT OF FATAL ACCIDENTS ACTS IS TO PROTECT HUMAN LIFE.

The purpose and effect of the numerous Legislative Acts enacted in the United States in general conformity with Lord Campbell's Act, is to correct an anomaly of the common law which afforded no redress in cases where a tortuous injury resulted in death. At common law there was no remedy to the estate of the person killed, nor to his survivors, for the wrongful taking of his life by negligence; nor was there any punishment to the wrongdoer unless the act amounted to a crime. Thus, whilst the common law afforded full remedy for injuries, it gave no protection and security against the actual taking of human life because it gave no redress.

The Act known as Lord Campbell's Act, and similar Acts in the United States were passed for the purpose of correcting this glaring injustice, and are intended to protect and secure human life, to punish the negligence and unlawful taking thereof, and to give compensation to the surviving widow or heirs of the deceased. These actions are allowed, sometimes to the administrator of the deceased, sometimes to surviving relatives, and sometimes they are brought in the name of the State; but in all cases they are allowed as a practical redress for the wrong and injury committed against the person whose life is unlawfully taken. The intention of the Acts is to make human life more secure by punishing, with an action for damages, those who fail to exercise care and caution, and who cause the death of another by the omission of a duty which they owe to him. It needs no explanation nor argument to show that to deprive one of his life by negligence, is an act essentially tortuous in its nature, and a wrong against the individual who is killed. All the rights of action

that are given by Lord Campbell's Act, and by the numerous similar enactments in this country, are founded and based upon the tort committed against the person of the deceased. It is this that is the gist and basis of all these acts. Withour negligence shown to him whose life is taken, or unless his life is taken contrary to his rights there is no action, either to his administrator, or his heirs, or any person, to recover any damages on account of his death. It is the purpose and intention of all these statutes to protect him by giving a practical remedy to surviving heirs, who are permitted to enforce it in his stead. This is the general purpose and intention of the Fatal Accidents Acts; and that it is so, has been held by the highest Courts of the United States and England.

This Court in the case of *Stewart vs. B. & O. Railroad Company, 168 U. S., 445,* discussed the nature of the statutes giving an action for death, and there held that they are merely for the purpose of affording a remedy which the common law neglected to give for an act that is in itself a tort. In Maryland, the place of the accident, the statute provided that the action for death should be brought in the name of the State; whilst the action in the District of Columbia, where this case was instituted, was brought by an administrator appointed in the District. This Court allowed the action to be maintained, notwithstanding the great difference in the statutes of the two jurisdictions, because it said that the general purpose of the statutes was the same, to redress a wrongful act causing death. Speaking by Mr. Justice Brewer, the Court said:

> "Notwithstanding the ability with which the arguments in support of this conclusion are presented in the opinion of the Court of Appeals, we are unable to concur therein. *A negligent act causing death is*

in itself a tort, and were it not for the rule founded on the maxim, actio personalis moritur cum persona damages therefore could have been recovered in an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. *The purpose of the several statutes passed in the States, in more or less conformity to what is known as Lord Campbell's Act, is to provide the means of recovering the damages caused by that which is essentially and in its nature a tort.* Such statutes are not penal, but remedial, for the benefit of the persons injured by the death. An action to recover damages for a tort is not local, but transitory, and can, as a general rule, be maintained wherever the wrongdoer can be found. *Dennick vs. R. R. Co., 103 U. S., 11,* It may well be that where a purely statutory right is created, the special remedy provided by the statute for the enforcement of that right must be pursued; but *where the statute simply takes away a common law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for that tort can be maintained in any State in which that common law obstacle has been removed."*

That the purpose and intention of the Fatal Accidents Acts are to protect and secure life and to furnish redress for an admitted tort against the person whose death is caused by wrongful act, is shown very clearly in the opinion of the Supreme Court of Massachusetts, delivered by Mr. Justice Holmes when Chief Justice of that Court, in the case of *Mulhall vs. Fallon, 176 Mass., 266.* This case is the leading case in this country holding that the Fatal Accidents Acts are enforceable in favor of non-resident aliens. In that case the Court had under

consideration the very question at issue here, except that it was construing a statute of Massachusetts and not a treaty of the United States. The learned Chief Justice said:

> "Under the statute, the action for death without conscious suffering takes the place of an action that would have been brought by the employee himself if the harm had been less, and by his representative if it had been equally great, but the death had been attended with pain. Stat. 1887, chap. 270, sec. 1, cl. 3. In the latter case there would be no exception to the right of recovery if the next of kin were non-resident aliens. *It would be strange to read an exception into general words when the wrong is so nearly identical and when the different provisions are part of one scheme. In all cases the statute has the interest of the employee in mind. It is on their account that an action is given to the widow or next of kin. Whether the action is to be brought by them or by the administrator, the sum to be recovered is to be assessed with reference to the degree of culpability of the employer or negligent person. In other words, it is primarily a penalty for the protection of the life of a workman in this State. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death.* In view of the very large amount of foreign labor employed in this State, we cannot believe that so large an exception was silently left to be read in."

The Supreme Court of Illinois, in *Kellyville Coal Co. vs. Petraytis, 195 Ill., 217,* affirms the same doctrine laid down in *Mulhall vs. Fallon,* and quotes the very words of

Mr. Justice Holmes, cited above, to the effect that the statute giving an action for death is a statute enacted primarliy for the benefit of the employees whose lives are at stake. The Court said:

> "In all cases the statute has the interest of the employee in mind. It is on their account that an action is given to the widow or next of kin. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than lingering death. In view of the large amount of foreign labor employed in this State, we cannot believe that so large an exception was silently left to be read in."

The King's Bench Division of the English High Court of Justice took the same view of the purpose of the Fatal Accidents Act, known in England as "Lord Campbell's Act," as was taken in Massachusetts. In *Davidson vs. Hill, 70 L. J. K. B. N. S., 788,* that Court, in permitting a non-resident citizen of Norway to recover in a suit instituted in the King's Bench Division of the High Court of Justice, used the following language by Mr. Justice Kennedy, who, with Mr. Justice Philimore, delivered an opinion in that case:

> *"The basis of the claim to which the Fatal Accidents Acts gives statutory authority, is negligence causing an injury, and that is a wrong that I think every civilized country treats as an actionable wrong.* They create, no doubt, a new cause of action (see per Lord Selbourne and Lord Blackburn in 'The Vera Cruz'), for previously the relatives of the deceased could not in England sue the wrongdoer. The

measure of damages is not the same as in an action by the injured man, and his death is an essential constituent of the action. *Nevertheless, as I venture to think, it is true to say that, in substance, the purpose and effect of the legislation is to extend the area of a reparation for a wrong which civilized nations treat as an actionable wrong.* Indeed the right of redress according to the decision of the King's Bench Division (see *Reed vs. Great Eastern R. R., 37 L. J. Q. B., 278*, and *Griffiths vs. Dudley, 51 L. J. Q. B., 543*) is so far identical with the wrong of the injured man that if death ensued after he has sued and recovered damages the relatives have no cause of action under this legislation."

Again we find the same language used and the same logic applied by the Appellate Court of Indiana in a case in which it allowed a non-resident alien to recover under the Fatal Accidents Act of that State. In *Cleveland, C. C. & St. Louis Ry. Co. vs. Osgood, 73 N. E., 285, pg. 286*, Justice Robley, speaking the opinion of the Court, said:

"The statute is a remedial one (Stewart vs. B. & O. R. R. Co., 168 U. S., 445; Lang vs. Houston, 144 N. Y., 117); *the essence of the Act is found in that part of it which confers a right of action, and not in that part which provides who shall bring it. Its tendency is to induce care and make human life more secure, a consideration of policy which is not affected by the alenage of the beneficiary. The right of personal security does not depend upon whether the beneficiary's wife and children live abroad.* (Mulhall vs. Fallon, 176 Mass., 266). *The wrongful act of the defendant forms the basis of the right.* It is not therefore material, in connection with the question

now under consideration, whether the statute gives a new right of action to the administrator or provides for the survival of the right possessed by the decedent. The Supreme Court of Wisconsin in *McMillin vs. Spider Lake Lumber Co., 91 N. W., 979* wholly overlooked the identity of the fact forming the substance of the act and denied recovery upon a purely artificial ground."

In the case of *Trota, Admin., vs. Johnston et al., 28 Ky. Law Rep., 851, pg. 853,* the Supreme Court of Kentucky sets forth in a clear and vigorous manner the purpose of the Fatal Accidents Act of that State, holding it to be for the purpose of carrying out the general public policy of the State to protect and secure human life. The Court said:

"This Court will take notice that the governments of the United States and Italy are at peace; hence the rule applicable to alien enemies cannot apply. In this country a man's life, as well as his body are deemed to be his own. He has an inherent right to life; and for the protection of life, liberty and property and the lawful pursuit of happiness, all laws are made. They are not partial, in that they protect citizens alone. They apply to mankind within the jurisdiction of the State. An alien friend cannot be lawfully deprived of his liberty in this State without cause, and if falsely imprisoned, might maintain an action for damages, not because the laws give him his right as to personal liberty, but because they recognize he already had the right. If his personal property were taken from him without due process of law, our Courts, administering the laws of this State, would restore it to him, albeit that in his

own country he might not have the right to own such property or maintain an action to recover it. This would not be allowed here, under the idea that our laws created in him the right to the property, but that they recognize that right is an incident to manhood. The law of this State deems it best that all men should be secure in their lives, liberty and property, not that some might be and others have no redress. *The Constitution and statutes allowing compensation for life lost through negligence of another, adopt a policy touching the most important subject of all government in which it is recognized that human life should be protected as well from negligence as from crime. It is in the interest of society that it should be. Giving to the estate of a victim the right to recover compensation based upon the earning value of the life destroyeyd, or in addition punitive damages where the negligence is gross, is deemed an efficacious remedy for a recognized evil. It may be in certain instances in lieu of public punishment, but in any event its enactment will act as a determent upon others and therefore will tend to promote the safety of human beings.* It could scarcely be said that a man has any greater right in his life now than he had before the constitutional provision and statutes of a kindred nature. His right was above all others, except when forfeited for crime. Nothing, therefore could add to it, but these provisions give remedies through the Courts that had not been previously administered. *The application of the remedy by the Courts is in pursuance of the public policy of the State to conserve human life within her jurisdiction. This policy is on a line with that which protects every human person in his liberty and his property, whether he be an alien or citizen, because it is best for the State that it be so."*

In view of the foregoing authorities, it can hardly be argued that the purpose and effect of the Fatal Accidents Acts are not to promote security and provide protection for human life. They are, as the Kentucky Court puts it, "efficacious remedies for recognized evils" and form practical and efficient means of preventing carelessness and willful violence. As Mr. Justice Holmes says in *Mulhall vs. Fallon, Supra.:*

> "The action for death without conscious suffering takes the place of an action that would have been brought by the employee himself if the harm had been less, and by his representative if it had been equally great and the death attended with pain. In the latter case there would have been no exception to the right of recovery to the next of kin or non-resident alien. It would be strange to read an exception into general words when the wrong is so nearly identical and when the different provisions are part of one scheme."

Our Legislatures and Congress are yearly placing upon our statute books numbers of laws for the prevention of negligence and laws to insure the safety of workmen and others, who are exposed to dangerous machinery and employed in dangerous places. The Safety Appliance Act, the Employees' Liability Act, enacted by Congress, and the numerous Mining Acts, Liability Acts and Acts regulating common carriers, passed by the different States, are examples of the efforts of the legislature to protect and conserve human life by legislation. All these Acts, where they do not specially provide for an action in themselves to recover for wrongful death, always presuppose the right to bring an action under the Fatal Accidents Act, in order to enforce these different statutes; and it is

the existence of this right to recover compensation for death that is the practical and efficient means of compelling corporations and other employers to take care that the statutory mandates of the Legislature and of Congress are obeyed.

Can any one doubt, who looks at the question through the plain eye of common sense, that giving to the wife or heirs of the deceased an action to recover damages for his wrongful death is a plain, ordinary and efficacious means of protecting and securing his life from negligence? He cannot sue if killed, but his heirs can; and the value of his life can be measured by his earning power, and the defendant compelled to pay accordingly. Does it make any difference to the negligent defendant who sues, or upon what theory the action is maintained? It must pay for its negligence, and the fact that the action exists is the cause compelling the defendant to exercise care and use every means possible to prevent accidents.

V.

DOES EQUAL PROTECTION INCLUDE THE BENEFIT OF THE FATAL ACCIDENTS ACTS?

In Article III. of the Treaty with Italy, it is provided that the persons of Italians residing in the United States shall be entitled to equal protection and security, and in this respect shall have all the rights and privileges that are conferred upon natives. Under this Article we contend that all the remedies known to the law by which security and protection are afforded to the persons of Americans are, by force of this Article of the treaty, intended to be granted to Italian subjects. Note that this Article does not confer in words any action or right of action upon Italians. It does not say how, nor by what means, they shall be protected. It merely guarantees that this Govern-

ment will protect and secure their lives in the same degree and to the same extent as it does those of its own citizens. Naturally this means that the law with respect to the Italian shall be the same as the law with respect to the American, and that every remedy which the Courts hold out to redress wrongs done the American shall exist in favor of the Italian.

The question that arises here, and calls for an answer, then is, Is it true, in a just and reasonable sense, as we have endeavored to point out above, that the Fatal Accidents Acts are founded upon a tort committed against the body and life of the deceased? Are they in substance and effect a remedy to redress this wrong; and are they a practical and efficient protection and security to human life? Is it true, as Mr. Justice Holmes said in *Munhall vs. Fallon, Supra.*, that these acts "act as a penalty for the protection of the lives of workmen in the State"?

The Supreme Court of Pennsylvania, in its opinion (R., 53) does not discuss this question which we pressed at bar—whether or not this action given by the laws of Pennsylvania to the heirs of her own citizens who have met their death by wrongful act is a practical and efficient protection to the lives of her citizens. It says that the action is brought by the wife for a distinct, separate and different cause of action than ever existed in the husband, and is to recover damages for her pecuniary loss, and

> "the action is not for the enforcement of any right that was in the party killed, but for a wholly distinct cause not affecting in any way the estate or rights of such party."

We submit that the learned Court is in error in holding this, because while theoretically the action is a new

right of action—new in the sense that it did not exist at common law and is not a survival of one that formerly existed in the deceased—yet this fact has no bearing upon the question whether or not this action is conferred upon Italians by this treaty; and, further, we submit that the learned Court has not regarded the nature of this action in its true light, nor has it applied it here as it has in other actions between citizens of that State, where it has repudiated the theory that the action is wholly different and distinct from the rights or estate of the party deceased.

It does not follow, even if for argument's sake we admit it ,that because the claim of the wife or heirs is distinct and separate from the claim that existed in the husband, therefore it is not within the meaning and purview of this treaty. The question is, *"Does the fact that the death of the American citizen in Pennsylvania, which gives rise to a right of action in his heirs, afford a means of protecting and securing his life?" Is it a safeguard which the law affords to enforce care and to protect his body from negligence or violence?* If so, it is immaterial by whom enforced. The treaty guarantees that it shall exist for his benefit. It might be enforced by the administrator of his estate for his creditors and heirs. It might be enforced by his wife for her loss. It might be enforced by the State as a penalty. Nevertheless, it cannot be denied that if this "unlawful violence," as the Pennsylvania statute calls it—"unlawful" against the deceased—gives rise to a right of action either in the administrator, the heirs, or in a public prosecutor, it must act as a protection and security to him and is intended so to act. The fact that the action is brought by the wife for her loss is not important; but the question is, does the action, which the negligent killing gives rise to, act as a protection and security to human life? If so, the treaty expressly says that the rights and privileges which are granted to natives in this respect shall be gr[illegible]d to Italian subjects.

My horse is killed by the defendant's negligence. The horse has no right of action. It cannot sue. I have the right to sue for my loss by its death. Will any one contend that the horse's life is not protected and secured fully by the fact that I may sue for my loss? Take away my right to sue for my loss in the horse's death and you have deprived the horse of every security and protection which the law can give him. It is no more necessary for a right of action to exist in the husband and descend to the administrator or surviving heirs than it is for a right of action to exist in my horse in order to afford a protection and security to the horse's life. The important fact is, does the action exist anywhere, and is it based upon the wrong done to the decedent? If so, then how can you afford equal protection and security and every right and privilege connected with the same, if you allow the action in the one case and deny it in the other?

VI.

ACTION BY HEIRS NOT SEPARATE AND DISTINCT FROM INJURY TO DECEASED, BUT ONLY A SUBSTITUTE FOR DECEASED'S RIGHT OF ACTION.

The Pennsylvania Supreme Court decided that under this treaty the action by the man, himself, or, if he had died after having brought the action, and his administrator had been substituted to prosecute the suit, then both of these actions would have necessarily been maintainable because they were actions intended to be conferred upon him by this treaty; but that the new action being conferred by statute upon the wife and the measure of the damages being her pecuniary loss by his death, that this action, not

being a survival from the deceased, did not afford him any protection, was not connected in any way with his injury, and therefore was not included within the terms of the treaty. We desire to point out the fact which we believe the learned Court below overlooked, and which the learned Court below has held in other cases, that the action for death, while it may be a new right of action in legal theory, and not a survival of the right which existed in the husband, is but a substitute for his action and is founded upon the injury done to him, and cannot be maintained except as a substitute for his right of action; nor can it be maintained unless it can be shown that there has been a wrong and injury committed against the deceased. The two actions are not separate. Both cannot be maintained. The heirs claim damages for the wrong suffered by the deceased, and base their claim upon the unlawful acts done toward him. The action by the heirs is merely a practical way of redressing the tort committed to the deceased. They must show a lack of duty to him, his freedom from negligence, and that he would be entitled to recover, if alive; and that he has not released or proescuted his right of action nor made any settlement thereof. If he has, they have no standing. The heirs when they come into court are merely substitutes for the deceased. That this is so is recognized by the Supreme Court of Pennsylvania itself. The widow in her action brings but a substitute for the right of action which would have belonged to her husband and did belong to her husband before his decease. He may settle or prosecute his claim to judgment, and if so, she has no action. It is only where there has been no reparation made for the wrong to the husband himself, that the widow has any standing to maintain her action; and the Pennsylvania Courts have distinctly repudiated the idea that the widow can maintain an action where the husband has released or settled his claim.

In *Hill vs. Pennsylvania Railroad, 178 Pa., 227,* Mr.

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Justice Greene, speaking for the Supreme Court of Pennsylvania, said:

"Substantially the question arising is whether the wife under our existing legislation and upon the facts of this case has an independent right of action for the death of the husband, which the husband could not release. It is contended for the appellant that she has such a right of action and that, therefore, the husband's release could not affect it. The solution of the question depends upon the construction to be given to our two Acts of Assembly of April 15, 1851, P. L. 674, and April 26, 1855, P. L. 309. The Act of 1851 provides as follows:

"Section 18. That no action hereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of the plaintiff; but the personal representative of the deceased may be substituted as plaintiff and prosecute the suit to final judgment and satisfaction.

"Section 19. That whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for and recover damages for death thus occasioned.

"It will be observed that in both these sections the right of action conferred is for the death of the party injured. The 18th section provides for the case of a party injured who has brought an action for his injury, but subsequently dies; and directs that in such case the action shall not abate by reason of the death, but shall survive to his personal represent-

atives. Section 19 provides that if no action has been brought for the injury during the life of the party injured, the widow, or if there is no widow, the personal representatives, may maintain an action and recover damages for the death thus occasioned. Thus both classes of cases are provided for; one where the action was brought by the injured party during his life, but the plaintiff died pending the action, and the other where no action had been brought at the time of the death of the party injured. While it is very true that the injured party could, in no circumstances, recover damages for his own death, yet it is equally true that the causes of action provided for by both sections is death resulting from injuries. *The Act did not undertake to give a cause of action to the party injured for the injuries he had sustained, because such a right of action already existed independently of the act. Hence it cannot be argued that the intention of the 18th section was to give one right of action to the party injured and another and independent right of action for the same injury to his widow. The cause of action is the same in both sections, to-wit, the death of the party;* the only difference being that the 18th section provided for an action pending, that it should not abate, but should survive to the personal representatives, and the 19th section provided that in case no action had been brought before the death of the party an action might be brought by the widow, or if there was no widow then by the personal representatives. The remedy given to the widow by the 19th section was, of course, a new remedy, which had no previous existence. This we hold in the case of *Fink vs. Garman, 40 Pa.*, and again *in Birch vs. Railway, 165 Pa., 339.* In the latter of which we said: 'While grounded on the same unlawful violence or negli-

gence for which the injured party had a common law right of action in his life time, the statutory right given by the 19th section is conditional upon the concurring facts that the injured party's death was occasioned by violence or negligence, and that no suit for damages was brought by him.' In the foregoing case the party injured, Mrs .Taylor, had brought an action in her life time to recover damages for the injury, but died pending the action before trial, thereupon an amended statement was filed alleging her death and praying to substitute her executors. To this the defendant pleaded that the cause of action survived to the persons named in the Act of 1855, and therefore, could not be maintained by the executors, but we held that it did survive to the executors under the 18th section of the Act of 1851. As to this we said: 'It follows from what has been said that the substitution of Mrs. Taylor's executors as plaintiffs in the action commenced by her was fully authorized, and they should be permitted to prosecute the same to final judgment and satisfaction, notwithstanding the fact averred in her amended statement that her death was occasioned by the defendant company's negligence. In the circumstances, their substitution was clearly warranted by the 18th section of the Act of 1851.' In substance this was a decision that although death resulted from the injury, the right of action survived to the executors of the decedent and was not transmitted to the other parties named. It is true an action had been brought by the injured party in that case, and here no action had been brought by the person injured before his death, but he had exercised his control over the right of action at a time when he alone had the whole right with the same effect as if he had brought an action and prosecuted it to judg-

ment and satisfaction. *The basis of the action is the negligent of the defendant. When the injured person survives, the sole right of action is vested in him alone. If he brings an action and it is tried and results in a verdict and judgment for the plaintiff which is paid, it must be conceded that this is the end of the case. The defendant's negligence has been tried and adjudged, and when the judgment has been discharged by the payment, it has been satisfied for all purposes. The consequences of the transgression have been suffered and the penalty paid. We cannot consider, and it has not been so decided, that in this contingency there may be another suit brought for another result of the same act of negligence.* The acts we are considering do not confer any such rights nor any right to recover as upon an additional cause of action. *In other words, without these actions and causes of action, a specific act of negligence would have died with the person and there could then be no recovery by anybody, but that consequence of the existing state of the law it was desired to avert and under the acts the action does not die, but survives to certain persons named, but it is an action for the same injury and upon the basis of the same negligence. The Acts accomplish the preservation of a right of recovery, but they do not give nor assume to give another and additional remedy to other persons for the same injury. If they would bear such a construction, it would follow that by force of the Acts there was a right to recover for injuries to the husband considered only as injuries to himself and in addition to that a new, other and independent right of action to the widow in her own right and for her own benefit and for the injury to herself. No such purpose is avowed in the Act, and no such meaning is within its language.* We

do not think the Act of April 26, 1855, P. L. 309, affects this view of the subject, or makes any change in the fundamental character of the previous legislation it simply enlarges the designation of the persons entitled to recover damages for 'injury causing death' so as to embrace children or parents of the deceased, and expresses the mode of the distribution of the damages recovered. The right of action was in its origin the sole property of the husband and of course subject to his control. If he exercised it and conducted it to verdict judgment and satisfaction in the courts, that was the end of it. Neither he nor any one else could maintain a second action for the same injury. So also he could compound it and could adjust the amount to be received from the offending party and could agree that the amount received should be a full solatium for the injury and the damage sustained. That would be a necessary incident to his ownership of a right of action. Such an adjustment would be the full equivalent of a verdict and a judgment in an adversary proceeding. In either event the remedy would be exhausted. It would have to be conceded that this must be so if subsequently to the adjustment some other and more serious consequence resulted from the injury than any that was anticipated when the settlement was made and we know of no reason why this would not be true when such ulterior consequence was the death of the party injured.

The very question we are considering here has been adjudged in the Queen's Bench in England, in the case of *Reed v. the Great Eastern Railway Co., L. R. 3 Queen's Bench 555.* The English Statute of 9 and 10 Victoria C. 93, is almost precisely like our Act of 1851 and was probably the model upon which

our Act was framed. In the case referred to the husband had sustained an injury on the defendant's road, and had subsequently settled with the defendant and executed a release of all damages arising from the injury, and had afterwards died. The defendant pleaded the release to which the plaintiff demurred. In disposing of the demurrer Justice Blackburn said:

'I think the plea is a good plea. The question turns upon the construction of S. 1 of 9 and 10 Victoria C. 93. Before the Statute the person who received a personal injury and survived its consequence, could bring an action and recover damages for the injury, but if he died from its effects, then no action could be brought.' To meet this state of the law 9 and 10 Victoria C. 93 was passed, and whenever the death of a person is caused by a wrongful act, and the act is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who would have been liable if death had not ensued shall be liable for an action for damages, notwithstanding the death of the party injured. Here taking the plea to be true the party injured could not 'maintin an action in respect thereof,' because he had already received satisfaction. Then comes section 2, which regulates the amount of damages and provides for its apportionment in a manner different to that which would have been awarded to a man in his lifetime. *This section may provide a new principle as to the assessment of damages, but it does not give any new right of action.* The intention of the enactment was, that the death of the person injured should not free the wrongdoer from an action, and

in those cases where a person injured could maintain an action, his personal representative might sue.

Judge Lush: 'I am of the same opinion. The intention of the statute is not to make the wrongdoer pay damages twice for the same wrongful act, but to enable the representatives of the person injured to recover in a case where the maxim actio personalis moritur cum persona would have applied. It only points to a case where the party injured has not recovered compensation against the wrongdoer.'

The English statute is somewhat broader than ours, because it is not limited to cases in which an action had been brought by the injured party, and he had died pending the action, nor yet to cases in which an action has been brought by the injured party in his lifetime, and the remedy is given without qualification in all cases. The second section authorizes the jury to give such damages 'as they may think proportionate to the injury resulting from said death to the parties respectively for whom and for whose benefit such action shall be brought,' that is, damages may be had for the death as declared in our 19th section of the Act of 1851, but yet a person injured has such a right in the cause of action that he may release the offending party from all damages. The assignments of error are not sustanied."

That the wife is but a substitute for the husband, and that her action is to redress the wrong and injury done him, is again very clearly set forth in the case of *Hughes v. D. & H. Canal Co., 176, Pa. 259,* where the question arose whether in an action by the wife to recover for the husband's death, a statement made by the husband before his death is admissible as against the wife. It was con-

tended that the husband's statement was not admissible, because he was not a party to the action, and that the wife sued entirely in her own right and to redress a wrong done her. This doctrine the Court clearly repudiated.

Mr. Chief Justice Mitchell, delivering the opinion of the Court, said:

> "For the same reason it was also error to exclude the statement by Hughes, the plaintiff's husband. It should have gone to the jury in connection with the circumstances under which it was made. This was excluded on the ground that it was not made by a party to the suit, and was not therefore admissible against the plaintiff. This is, however, no more tenable than the other. *At the time the statement was made the only right of action there was at all was in Hughes Plaintiff had no claim until he died and then the foundation of her claim was the injury to him for which he might have sued in his life time. If the defendant would not have been liable to him in the first instance it was not made liable to her by his death. We are not aware of any case—certainly our attention has not been called to any—in which a widow has recovered for injuries to her husband when he could not have done so himself if he had survived. And on principle it is clear that she never can do so, and that hers is but in succession or substitution for his where he has not asserted it himself. If he has done so, then his action survives, if he has not, then by virtue of the statute she brings hers in his place, but for the same cause."*

The same doctrine was laid down by this Court in a recent case of the *Northern Pacific Railroad Co. v. Adams, 192 U. S., 440,* where the question arose whether a widow

could recover for her husband's death when he had been killed while riding upon a pass. The pass he had accepted contained a provision releasing the company from any damages due to the negligence of its servants. The Court below held:

> "That the right of action of the widow was separate and distinct from the action the husband would have brought, and that the release by him of his rights did not affect her right of action."

This Court reversed the case and declared her action was not a different right of action, but was founded upon the wrong done him, and that if he released the company from the consequences of its negligence, that his heirs had no standing to complain.

Mr. Justice Brewer, delivering the opinion of the Court, said:

> "As the negligence found by the jury to have caused the death, as well as the resulting death took place in Idaho, the plaintiff's right of action rests upon the statute of that State. What is the scope or meaning of that statute? The Circuit Court charged the jury: 'You are not to consider what was the duty of this carrier toward Mr. Adams, who was killed, but the duty which the defendant owed to these plaintiffs, and the duty which they have the right to exact from the defendant in this case is the same duty which the defendant owed to the public in general.'
>
> *In other words, though it should appear that the companyy in no respect failed in its duty to the deceased, it could yet be held responsible to the widow and son for the damages they suf-*

fered by reason of the death. But that is a misconception. Their right of action arises only when his death is caused by the 'wrongful act or neglect.' If there be no omission of duty to the decedent, the heirs have no claim. Suppose an individual is wantonly assailed and in order to protect his own ilfe is obliged to kill the assailant, may the heirs of the decedent have that act of taking life, rightful as against the decedent, adjudged wrongfully as against them, and recover damages from one who did only that which his duty to himself and his family required him to do? The Statute does not provide that when one life is taken by another, the heirs of the former may recover damages, but only when it is wrongfully taken; that is, when it is taken in violation of the rights of the decedent; wrongful as against him. 'Neglect' stands in the same category with 'wrongful act.' it implies some omission of duty.

The two terms, therefore, 'wrongful act' and 'neglect' imply alike the omission of some duty, and that duty must, as stated, be a duty owing to the decedent. It cannot be that if the death is caused by a rightful act, or an unintentional act, with no omission of duty owing to the decedent it can be cosidered wrongful or negligent at the suit of the heirs of the decedent. They claim under him, and can recover only in case he could have recovered damages had he not been killed, but only injured. The Company is not under two measures of obligation, one to the passenger, the other to the heirs. If it discharges its full obligation to the passenger, his heirs have no right to compel it to pay damages."

The foregoing authorities are sufficient to show that both this Court and the Supreme Court of Pennsylvania are of opinion that the action, while it may be a new action given by statute, is but a substitute for the one that would have been brought by the deceased had he lived, and that it is given chiefly to redress the wrong and injury done the person against whom the neglect is committed. As Mr. Justice Brewer says in the Adams case:

> "The Statute does not provide that when one's life is taken by another, the heirs of the former may recover damages, but only when it is wrongfully taken in violation of the rights of the decedent; wrongful as against him. 'Neglect' stands in the same category with 'wrongful act.' It implies some omission of duty."

The Pennsylvania Act says: "Whenever death shall be occasioned by unlawful violence and injury."

Does this not mean unlawful violence and injury to the deceased? Is not the action to redress this unlawful violence and injury to him? Is the injury to him not the basis of the action? How then can it be said that this action has no connection with the person while in this country? His rights are indissolubly bound up in the action and his wrongs are redressed by the verdict. The law is a practical science. It deals with conditions as they exist. It cannot protect him by compensating him after his death, but it can do so and does do so by substituting his heirs to bring an action in his stead.

VII.

FREE ACCESS TO THE COURTS.

In Article 23 of this treaty we find that Italians are promised free access to the Courts of Justice to maintain and defend their rights upon the same terms and conditions as natives of the United States. An examination of the record of this case shows that the plaintiff was non-suited, solely upon this ground, and no other, that she is a non-resident Italian subject and never lived in the United States.

In order to affirm this judgment, it must be held that the meaning of this Article is not to remove the disability of alienage.

What are the rights of an alien, with respect to the matters concerning which this suit is brought, in the State of Pennsylvania? If we take the theory upon which the Supreme Court of Pennsylvania held that the suit was alone maintainable—to-wit, that it was allowed for the pecuniary injury suffered by the person maintaining it under the statute and for his benefit alone, unconnected with any wrong suffered by the decedent—we find that under the law of Pennsylvania an alien's rights to the support and maintenance of her husband are exactly the same as those of a citizen. If the husand deserts her, she may secure allowance in the Quarter Session Court, or alimony in the Common Pleas. If she is living here when the husband is killed, she may maintain her action and recover in precisely the same way as a native, and her damages are measured by the same rule.

Outside any treatyy provision, she becomes his heir and is entitled to his estate, real and personal, at his death. Her interest in his life is recognized and protected to the same extent and her rights in his life are regarded as exactly the same as those of an American. No

one doubts nor denies that the alien Italian wife when in Pennsylvania has precisely the same interest in her husband's life as has the wife of the citizen. The law of Pennsylvania recognizes no difference between the two.

The law of Pennsylvania recognizes these rights to exist, and they do exist just the same whether the widow lives in Pennnsylvania or Italy. No one would say for a moment that they did not exist merely because she happened to live abroad. The only reason that this action is not maintainable under the statute (according to the construction placed upon it by the Supreme Court) is that the Legislature has failed to afford the proper remedy by not including aliens residing abroad within its scope. The non-resident alien, while entitled to the same protection, was not included in the statute because not specifically named.

Is this very thing not accomplished by the terms of Article 23 of this treaty? The treaty says the Courts shall be oepn to Italians, resident or non-resident, upon the same terms and conditions as natives. That it included non-resident Italians is certain, because it specifically provided that they need not sue in person, but may maintain their action by agent, factor or attorney.

As we have pointed out above, the effect of this treaty is merely to enlarge the scope of this Statute, by conferring rights upon Italians that our own citizens enjoy. The right to the support of her husband is a right that the law of Pennsylvania recognizes to belong to a wife, citizen or alien, resident or non-resident. How then, if the Italian wife has this right under the law of Pennsylvania, and may maintain her action for the death of her husand when she resides here, can you assure her free access to the Courts to maintain and defend her rights, and then non-suit her solely upon the ground that she is a non-resident alien? The treaty covenant was entered into by these two nations in order to

extend to the citizens of either, the benefits that natives enjoy, including the right to maintain the same actions in the Courts in defending their rights. We recognize these rights, admit their existence. We promise the same free access to the Courts to maintain and defend them that we give to our own citizens. Shall we say that we are keeping faith with the Italian Government, that we are giving this treaty a liberal, or even a fair interpretation, if we hold that this 23rd Article of the treaty has no effect whatever to enlarge the scope of this Statute: that it confers no rights in the Courts of Pennsylvania to maintain this action, and that the plaintiff can be non-suited solely because she is a non-resident Italian subject?

If the 23d Article of this treaty has any meaning or any effect whatever upon the status of Italians in our Courts, it is obvious that it must have the effect of extending to Italians the provisions of this Statute of 1855. The obvious purpose of this Article in extending the same freedom in the Courts to Italians as to Americans is to remove any disabilities to sue that might be imposed within the different States of the Union, solely upon the ground of alienage. So far as recourse to the Courts is concerned, to maintain and defend actions in vinndication of their rights, the Italian must stand in the same place as a citizen. The Federal Government promises that he shall. The fact that he is an alien shall not be used against him as a ground to defeat his right to sue in the Courts, if he sues in defense of rights that are properly his.

The plaintiff in this case was denied free access to the Courts. She was told she could not sue because she is a non-resident alien, and that the law affords her no right of action for her husband's death. Why? Because the Statute does not include her winthin the scope of the remedy it affords to a citizen. But of what moment is

it that the Statute does not include her? She is assured by the treaty that the right of free access to the Courts is hers equally with citizens. The Federal Government extends to her by treaty what the State Government has given our own citizens by statute. What can "free access to the Courts" mean, if not the right to maintain actions at law in the same way as citizens? When an Italian is denied the right to maintain an action because she is an alien, the 23rd Article of this treaty is violated, because it has placed her upon an equality with the American and opened to her the doors of the Courts in every way that is possible to our citizens, in order to maintain and defend their rights.

But it may be urged that this 23rd Article, which gives free access to the Courts to defend her own rights is not applicable, because the plaintiff in error has no rights here to maintain, and that it is only where she has a "right of action" that she has any access to the Courts.

We submit that the word "rights" cannot mean rights of action in the technical, legal sense. If it does, then this article of the treaty could have no meaning at all. Any State Legislature might refuse access to the Courts by providing that the right of action or remedy should not extend to or include aliens. The result would be that the right of free access would be worthless, because by a fiction, the alien would have no "rights of action" and therefore no "rights" in Court to defend or maintain.

"Rights" as used in this treaty is used in that broad natural sense which would be ordinarily understood when men are seeking to regulate the international affairs of two great countries—rights of life, liberty and property, equal protection of the laws, rights which are recognized in this country as belonging to all men, citizen and alien alike, the rights to labor and to make contracts. The rights of which this plaintiff has been deprived, if

we regard this suit as maintainable exclusively on her behalf and for her pecuniary loss, are rights which existed long before any statutory action for death was permitted. If they did not exist, no Legislature could give an action for their loss, and these same rights now exist with respect to the plaintiff. The law of Pennsylvania recognizes her rights to the support and maintenance of her husband; and had she lived here, so as to come within the meaning of the statute given to redress the violation of these rights of which she has been unlawfully deprived, the law would have permitted her to secure a verdict in vindication thereof.

It is these rights then that she asks to maintain—rights of which the law, as well as an ordinary sense of justice recognized the existence. The statute has not afforded her the remedy, because as the Supreme Court of Pennsylvania said in the *Deni case:*

> "We do not legislate for men beyond our jurisdiction."

The treaty has remedied this, and has legislated for men beyond our jurisdiction, which is the most ordinary purpose of treaties—by saying that the subjects of the King of Italy shall be entitled to defend and maintain their rights in Court on the same terms and conditions as natives.

VIII.

RULE IN THIS COURT FOR THE INTERPRETATION OF TREATIES.

In passing upon the question of the meaning of this treaty, it is important to bear in mind the rule that has

been laid down by this Court, for the interpretation of treaties. Treaties are contracts between nations and are entered into for the purpose of preserving peace, promoting intercourse, securing and protecting persons and property, and promoting friendship and good feeling between nations and their respective peoples. The meaning and purpose of treaties is to be found much in the same manner as we find the meaning and purpose of contracts between individuals, by endeavoring to determine the intention of the parties to the treaty from the words that they have used; but in this country the Supreme Court has laid down a well-settled doctrine, that rights claimed under treaties are to be governed by a liberal and not a narrow construction of the treaty. If the rights are doubtful they are to be granted and not withheld; because the purpose of the treaty being to promote friendship and good feeling between powers, a narrow construction or a strict construction, such as we give to criminal laws, would have, without doubt, the opposite effect. It has, therefore been many times asserted in this Court that treaties will be interpreted in a spirit of the highest good faith and with the most liberal leaning toward the rights of aliens who claim under a treaty; and there are a number of cases in this Court in which doubtful meanings have been construed in favor of the alien, which, had the instrument under consideration been other than a treaty, the interpretation would have been without doubt the opposite.

The case of *Hauenstein v. Lynnhem, 100 U. S. 483,* is an excellent example of the rule in this Court showing the interpretation of treaties where there is a doubt as to their meaning. In this case, a citizen of Switzerland had died in Virginia, leaving heirs abroad. Under the treaty with Switzerland, the heirs of the Swiss had a right to sell the real estate and personal property of their ancestor and to transport the same from the country within the time allowed by the law of the United States. The law of the

United States, however, was the law of Virginia, and Virginia did not grant to aliens any time in which to sell and withdraw the proceeds of their ancestor's property. The State sought to escheat it, and the heirs claimed the protection of the treaty with Switzerland. This Court held that Virginia could not escheat the property because the evident meaning of the treaty was to grant some time in which to withdraw the property, and that this Court would permit it to be within a reasonable time, even though the law of Virginia granted no time to aliens.

Mr. Justice Swayne, speaking for the Court, (pages 486 and 487), said:

> "It was clearly the intention of the clause in question in the treaty of 1850 to secure to the beneficiaries absolutely the right 'to sell said property' and 'to withdraw and export the proceeds thereof without difficulty.' Otherwise the language used is a sham and a mockery. The only qualification is as to the time within which the right is to be exercised. It has been earnestly contended, in behalf of the defendant in error, that the State having fixed no time within which this must be done, it cannot be done at all, and that the entire provision thus became a nullity, and is as if it were not.
>
> The terms of the limitation imply clearly that some time and not no time, was to be allowed. If it had been suggested to those who negotiated this treaty to express in it the effect of the construction in plain language, can it be doubted that it would have been promptly rejected by both sides as a solecism and contrary to the intent of the parties?
>
> Where a treaty admits of two constructions—one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be pre-

ferred. *Shanks v. Dupont, 3 Pet., 242.* Such is the settled rule in this Court."

This Court again in the case of *Geoffry v. Riggs, 133 U. S., 266,* in interpreting a treaty with France, showed its disapproval of a narrow and technical view that was urged in the interpretation of that treaty. By Article VII. of that treaty the subjects of the two contracting nations were permitted to inherit lands within the States of the other, and it was contended on behalf of one of the parties to this case that the treaty could not apply in the District of Columbia, because the District of Columbia is not a State. This Court, however, refused to interpret the treaty in any such manner, and held that the States of the Union meant all the territory of the United States.

In delivering the opinion of the Court, Mr. Justice Field said:

"A right which the Government of the United States apparently desires, that citizens of France should enjoy in all the States it would hardly refuse them in the District embracing its capital, or in any of its own territorial dependencies. By the last clause of the Article the Government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property, and to inheritance, as are enjoyed there by its own citizens. There is no limitation as to the territory of France in which the right of inheritance is conceded. And it declares that this right is given in like manner as the right is given by the Government of the United States to citizens of France. To ensure reciprocity in the terms of the treaty, it would be necessary to hold that by 'States

of the Union,' is meant all the political communities exercising legislative powers in the country, embracing not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as Territories, and the District of Columbia. *It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them, as they are contracts between independent nations. In their construction, words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this Court, that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred. Hauenstein v. Lynnham, 100 U. S., 483, 487.* The stipulation that the Government of France in like manner accords to the citizens of the United States the same rights within its territory in respect to real and personal property and inheritance, as are enjoyed there by its own citizens, indicates that that Government considered that similar rights were extended to its citizens within the territory of the United States, whatever the designation given to their different political communities."

And again this Court, in the case of *Tucker v. Alexanderdruf, 183 U. S. 437,* laid down emphatically the rule that treaties must be given a broad and liberal construction for the purpose of maintaining the friendly relations that ought to exist between great powers. The case under

discussion there was the right of a Russian officer, under a treaty with Russia, to arrest a deserter from a Russian Man-of-War. Mr. Justice Brown, delivering the opinion of the Court, said:

> "We think the rights of the parties must be determined by the treaty, but that this particular convention being operative upon both powers, and intended for their mutual protection, should be interpreted in a spirit of *uberima fides,* and in a manner to carry out its manifest purposes; as *treaties are solemn obligations entered into between independent nations for the common advancement of their interests and the interests of civilization; and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to preserve a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of perpetual amity so far as it can be done without the sacrifice of individual rights, or of those principles of personal liberty which lie at the foundation of our jurisprudence."*

The above are the leading cases in this Court, setting forth the rule for the interpretation of treaties, and this rule of liberal interpretation has been, and is now, we believe, the settled doctrine of this Court.

IX.

THIS COURT MUST PASS AN INDEPENDENT JUDGMENT UPON THE MEANING AND EFFECT OF THE PENNSLVANIA FATAL ACCIDENTS ACT.

When the Supreme Court of the United States is called upon to determine the validity of a State Enactment which is alleged to be in conflict with a Federal law or treaty, or to reverse a decision in a State Court against a right or privilege claimed under the Constitution, laws or treaties of the United States, it must, of necessity, determine for itself what is the meaning, effect and scope of the State statute: and cannot be bound by the interpretation placed thereon by the State Court. If it were otherwise, there would be little use of an appeal to this Court. If the State Supreme Court were permitted to put its own interpretation upon a statute, it might easily declare the statute to mean this or to mean that, or to have this effect or that effect; which, if taken to be the true effect or meaning, could not possibly be subversive of the right claimed under the higher law. This Court must for itself examine the act in question, determine for itself what is its meaning and effect in actual fact and when put into actual operation, and then say whether it is in conflict with the Constitutional laws or treaties of the United States, or whether it is superceded by the higher law.

This principle has been announced by this Court in many decisions.

In *Yick Wo v. Hopkins, 118 U. S. 356,* this Court had before it, the question of the validity of an ordinance of the City of San Francisco, which prohibited persons from using and maintaining laundries within certain districts of

the city, without permission from the Board of Supervisors of the City of San Francisco. In holding the ordinance void, because contrary to the 14th amendment and to the treaty with China, this Court, speaking by Mr. Justice Matthews, said:

> "In the case of the petition brought here by Writ of Error to the Supreme Court of California, our jurisdiction is limited to the question whether the plaintiff in error has been denied a right in violation of the Constitution, laws or treaties of the United States. The question whether his imprisonment is illegal under the Constitution and laws of the State is not open to us, and although that question might have been considered in the Circuit Court in the application made to it, and by this Court on appeal from its order, yet judicial propriety is best consulted by accepting the judgment of the State Court upon the points involved in that inquiry. *That, however, does not preclude this Court from putting upon the ordinance of the supervisors of the City and County of San Francisco an independent construction; for the determination of the question, whether the proceedings under those ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge.*
>
> We are, consequently, at the outset constrained to differ with the Supreme Court of California upon the real meaning of the ordinances in question.

Again this Court, in the case of *Atcheson, Topeka & Sante Fe Railroad v. Matthews, 174 U. S., 96,* in upholding the validity of a statute of Kansas as a valid police regulation, speaking by Mr. Justice Brewer, said:

> "It may be suggested that this line of argument leads to the conclusion that a statute of one State whose purpose is declared by its Supreme Court to be a matter of police regulation will be upheld by this Court as not in conflict with the Federal Constitution, while the statute of another State precisely similar in its terms will be adjudged in conflict with that Constitution, if the Supreme Court interprets its purpose and scope as entirely outside police regulations. But this by no means follows. *This Court is not concluded by the opinion of the Supreme Court of the State. Yick Wo v. Hopkins, 118 U. S., 356. It forms its own independent judgment as to the scope and purpose of a Statute; while, of course, leaning to any interpretation that has been placed upon it by the highest Court of the State. We have referred to the interpretation placed upon the respective statutes of Kansas and Texas by their highest Courts, not as conclusive, but as an interpretation toward which we ought to lean, and which, in fact, commends itself to our judgment."*

The same doctrine has been many times announced by this Court in those cases which are brought to this Court upon the ground that certain State enactments impair the obligations of a contract. Where the State Court merely decides whether or not a contract actually exists or not this Court has no jurisdiction, but where the contract is alleged to exist and subsequent legislation is alleged to impair its obligations, this Court will always examine the

question whether or not there is a contract and whether or not it is impaired by later legislation, and both of these matters will be examined by this Court independently of any construction or decision by the State Court.

In *Jefferson Branch Bank v. Skelly, 66 U. S., 436-443,* the Court said:

> "It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State whenever such a Court shall adjudge that not to be a contract, which has been alleged, in the form of legal proceedings, by a litigant to be one within the meaning of that clause of the Constitution of the United States that prohibits the States from passing laws impairing the obligation of contracts. *Of what use would the appellate power be to a litigant who feels himself aggrieved by some particular State legislation, if this Court could not decide independently of all adjudication by the Supreme Court of a State whether or not the phraseology of an instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State?"*

To the same effect is the decision of this Court in *Mobile & Ohio Railroad v. Tennessee (153 U. S., 486-492-493),* when the Court, speaking by Mr. Justce Jackson, said:

> "It is well settled that the decisions of a State Court holding that as a matter of construction, a par-

ticular charter, or a charter provision does not constitute a contract, is not binding upon this Court. The question of the existence or non-existence of a contract in cases like the present, is one which this Court will determine for itself, the established rule being that when the judgment of the highest Court of a State, by its terms, or necessary operation gives effect to some provision of the State law, which is claimed by the unsuccessful party to impair the contract set out and relied upon, this Court has jurisdiction to inquire whether such a contract exists as claimed and whether the State law impairs its obligation."

To like effect has the rule been in construing the full faith and credit clause of the Constitution. Where the Supreme Court of Maryland had refused to enforce a judgment recovered in the State of New York, because it held the judgment to be a penalty, this Court refused to consider itself bound by the Maryland Court's opinion as to the nature of the liability, for which the judgment had been recovered, but went on to determine the matter for itself. *Huntington vs. Attell 146 U. S., 657-683-684.* Mr. Justice Gray, delivering the opinion of the Court, said:

"If a suit to enforce a judgment rendered in one State, and which has not changed the essential nature of the liability is brought in the Courts of another State, this Court, in order to determine on a Writ of Error whether the highest Court of the latter State has given full faith and credit to the judgment must determine for itself whether the original cause of action is final in the international sense. The case in this regard is analogous to one arising under the clause of the Constitution which forbids a State to pass any law impairing the obligation of a contract,

in which, if the highest Court of a State decides nothing but the original construction and obligation of a contract, this Court has no jurisdiction to revise its decision; but if the State Court gives effect to a subsequent law, which is impugned as impairing the obligation of the contract, this Court has power, in order to determine whether any contract has been impaired to decide for itself what the true construction of the contract is. *New Orleans Water Works v. Louisiana Sugar Refining Co., 125 U. S., 18-38.* So if the State Court in an action to enforce the original liability under the law of another State, passes upon the nature of that liability and nothing else, this Court cannot review its decision, but if the State Court declines to give full faith and credit to a judgment of another State, because of its opinion as to the nature of the cause of action upon which the judgment was rendered, the Court, in determining whether full faith and credit had been given to that judgment must decide for itself the nature of the original liability."

And so in the present case this Court, in order to determine the rights of plaintiff in error under this treaty must determine for itself what is the nature of the cause of action given by the Pennsylvania Statutes to citizens of Pennsylvania, and what is the effect and intention of these statutes in affording protection and security to citizens of Pennsylvania. Is this right of action in purpose and intent given to protect and secure the lives of living persons as well as to compensate their heirs, and is this action one of the remedies that the treaty intended to confer upon Italian subjects in order to give force and effect to those provisons which guarantee equal protection and seecurity to the persons and property of Italians and free access to

the Courts to maintain and defend their own rights? To these questions this Court is bound to give an answer of its own.

X.

CONSTRUCTION OF TREATY BY STATE DEPARTMENT.

We desire to call this Court's attention to the interpretation placed upon this treaty by the Department of State, as shown by the position taken by Secretary Blaine in 1891, when the question of the proper protection of Italian subjects in this country caused a disturbance of diplomatic relations between the United States and Italy. This occurred over what are known as the Mafia Riots in New Orleans. On March 14th, 1891, a number of Italians then confined in the jail in New Orleans were taken from the jail and hanged by a mob. The people of New Orleans justified the action of the mob because the courts had failed to administer justice to the members of the "Mafia Association" through fear and intimidation of the juries. A discussion immediately arose upon the application of the Italian Government for redress, whether the Federal Government had any power to punish the rioters or any right to demand damages for the widows and orphans of the men hanged. On April 2nd, 1891, the Italian Government repeated its demands for prompt settlement of its claims and demanded indemnity for the families of the men who had been killed. We give below a short extract from the cable of Marquis Rudini to the Marquis Imperiali, which was received at the State Department on May 4, 1901, and also a portion of the letter of Secretary Blaine dated April 1, 1891, to the Marquis Imperiali, the Italian Minister to the United States. Marquis Rudini

said (Foreign Relations of the United States, 1891, p. 712):

"Far above all astute arguments remains the fact that henceforth the Federal Government declares itself conscious of what we have constantly asked, and yet it does not grant our legitimate demands.

"Mr. Blaine is right when he makes the payment of indemnity to the families of the victims dependent upon proof of the violation of the treaty; but we shrink from thinking that he considers that the fact of such violation still needs proof. Italian subjects acquitted by American juries were massacred in prisons of the State without measures being taken to defend them.

"What other proof does the Federal Government expect of a violation of a treaty wherein constant protection and security of subjects of the contracting parties is expressly stipulated?

"We have placed on evidence that we have never asked anything else but the opening of regular proceedings; in regard to this, Baron Fava's first note, dated March 15th, contained even the formula of the telegram addressed on the same day by Mr. Blaine, under the order of President Harrison, to the Governor of Louisiana. Now, however, in the note of April 14, Mr. Blaine is silent on the subject which is, for us, the main point of controversy.

"We are under the sad necessity of concluding that what to every other government would be the accomplishment of simple duty is impossible to the Federal Government. It is time to break off the bootless controversy. Public opinion, the sovereign

judge, will know how to indicate an equitable solution of this grave problem.

"We have affirmed, and we again affirm our rights. Let the Federal Government reflect upon its side if it is expedient to leave to the mercy of each state of the Union, irresponsible to foreign countries, the efficiency of treaties pledging its faith and honor to entire nations."

Mr. Blaine's letter is as follows (Foreign Relations of the United States, 1891, p. 685):

"The United States did not, by the treaty with Italy, become the insurer of the lives or property of Italian subjects resident within our territory. No government is able, however high its civilization, however vigilant its police supervision, however severe its criminal code, and however prompt and inflexible its criminal administration, to secure its own citizens against violence prompted by individual malice, or by sudden popular tumult. The foreign resident must be content in such cases to share the same redress that is offered by the law to the citizen, and has no just cause of complaint or right to ask the interposition of his country if the Courts are equally open to him for the redress of his injuries. *The treaty, in the first, second, third and, notably in the twenty-third articles, clearly limits the rights guaranteed to the citizens of the contracting powers in the territory of each to equal treatment and to free access to the Courts of Justice.* Foreign residents are not made a favored class. It is not believed that Italy would desire a more stringent construction of her duty under the treaty. Where the

injury inflicted upon a foreign resident is not the act of the government or of its officers, but of an individual, or of a mob, it is believed that no claim for indemnity can justly be made, unless it shall be made to appear that the public authorities charged with the peace of the community had connived at the unlawful act, or, having timely notice of the threatened danger, have been guilty of such gross negligence in taking the necessary precautions as to amount to connivance.

"If, therefore, it should appear that among those killed by the mob at New Orleans, there were some Italian subjects who were resident or domiciled in that city, agreeable to our treaty with Italy, and not in violation or our immigration laws, and who were abiding in the peace of the United States and obeying the laws thereof, and of the State of Louisiana, and that the public officers charged with the duty of protecting life and property in that city connived at the work of a mob, or, upon proper notice or information of the threatened danger, failed to take steps for the preservation of the public peace, and afterwards to bring the guilty to trial. the President would, under circumstances, feel that a case was established that should be submitted to the consideration of Congress, with a view to the relief of the families of the Italian subjects, who had lost their lives by lawless violence."

The foregoing correspondence between Secretary Blaine and the Italian Minister of foreign affairs, is elucidating on the question, whether or not these gentlemen regarded the rights of Italian residents in the United States to be the same as those of citizens. It will be noted that the Italian Government asks that the Federal Gov-

ernment take extraordinary measures against these rioters and alleges that it is bound under the treaty one way or the other, to secure an indemnity for the heirs of these deceased subjects of Italy. *Mr. Blaine's position is exactly that which we contend for here; that is,—absolute equality of remedy to Italians and native Americans alike. He says Italians are placed by the treaty in an exactly equal situation and cannot ask for remedies and favors which are not open to citizens, but he does not think of intimating that the Italian should not be given every remedy which is open to the citizen for redress. He says the foreign resident must be content in such cases to share the same redress that is offered by the law to the citizen and has no just cause to complain, or right to ask the interposition of his country if the Courts are equally open to him for the redress of his injuries. It is precisely this equality which Mr. Blaine was of opinion that the treaty expressly gave and which he did not undertake to deny, that the plaintiff in this case asks of this Court.* She does not have the redress open to citizens; she does not have the free access to the Courts for the maintenance of her rights open to citizens of the United States; and she and her husband, by the refusal of the Pennsylvania Court to permit her to maintain this action, are denied the equal protection of the laws, which the Government of the United States has expressly promised to them.

Growing out of the same Mafia Riots a case involving this treaty was brought before the Circuit Court of Appeals in the case of *New Orleans against Abbagnato, 23 U. S. Appeals 533*, where the plaintiff endeavored to recover against the City of New Orleans damages for the destruction of her son's life by the mob. The Court held that there was no way in which the plaintiff could recover against the City of New Orleans, because that municipality was not liable under the law of Louisiana for the failure of its police officers to do its duty. However, the Court

expressly held that, if there had been any remedy open to American citizens, the same remedy must, by virtue of the treaty, be granted to the plaintiff. The opinion of the Court is as follows:

> "The treaty between the Kingdom of Italy and the United States, proclaimed on November 23, 1871, guarantees to the citizens of either nation in the territory of the other, 'the most constant protection and security for their persons and property,' and further provides that 'they shall enjoy in this respect the same rights and privileges as are, or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives.' Treaty of November 23, 1871, 17 Stat. (Treaties) 49, 50, Art. 3. *This treaty applies to this case only so far as to require that the rights of the plaintiff shall be adjudicated and determined exactly the same as if she were, and her deceased son had been, native citizens of the United States.*"

XI.

CONCLUSION.

To summarize the contentions of plaintiff, we believe that the Supreme Court of Pennsylvania is in error in entering a non-suit against plaintiff on the sole ground that she is a non-resident alien, for the following reasons:

First. The action which is given to the widow while given to compensate her, is founded on the injuries done to her husband, and is, therefore, one of the remedies and the

most important remedy, for the protection and security of his life, which Article III. of the treaty promises to Italians in the same measure as to the native American.

Second. While the statute admittedly did not confer upon Italians the action, yet the treaty expressly confers it upon them, by promising them equal protection and security to their persons and property. The treaty, therefore acts upon the statute as an amending clause, and extends its scope to cover the plaintiff in this case.

Third. The Supreme Court of Pennsylvania has expressly decided (see Hill v. Pennsylvania Railroad Company, 178 Pa., 227), that the cause of action given by this statute to the widow is not a new and independent cause of action, but is merely part of a scheme for preventing the escape of a wrongdoer without punishment. It is, therefore, one of the remedies which, while not exercised in person by the deceased, is for his protection and security as well as to compensate his survivors.

Fourth. You cannot afford equal protection and security to the person of the Italians when you permit an action for damages for the death of the American and refuse an action for damages for the death of an Italian, whether the action be brought by the wife, children, parents, executors or administrators. The fact that the action exists to punish and redress negligence in the one case affords a protection to human life, and if it is not permitted in the other case, the same protection and security is not afforded.

Fifth. Free access to the Courts to maintain and defend her own rights is meaningless if the plaintiff does not have the right to maintain this action. Her own rights in the support and maintenance of her husband,—her rights

to look to him for pecuniary reward, are exactly the same under the law of Pennsylvania and of the United States with respect to her, as to the citizen. The treaty, therefore, in promising free access to the Courts, gives the right of action here contended for and under Article XXIII. it is immaterial whether plaintiff is living in the United States or abroad.

Sixth. Under the rule for the interpretation of treaties in this Court, we contend it would be absurd to suppose that diplomatic representatives of the United States and Italy in entering into a treaty in which they undertake to protect and secure the lives of their citizens in the territories of the other, in the same degree as the lives and property of natives are protected. should intend to omit from the treaty the only right of action which provides a remedy against negligence causing death.

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Office Supreme Court, U.
FILED.
JAN 22 1909
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States

No. 103 OCTOBER TERM, 1908.

MARIA GUISEPPA RAFFAELA MAIORANO,
Plaintiff in Error.

vs.

BALTIMORE & OHIO RAILROAD COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Brief for Defendant in Error.

Neither the plaintiff in error nor her children were at any time residents or sojourners in the United States.

The propositions of the defendant in error are therefore:

First. That there is no statute of the Commonwealth of Pennsylvania giving to the plaintiff or to her children a right of action to recover damages for the death of Carmine Maiorano, the husband of the plaintiff, and the father of the children.

Second. That the treaty between the Kingdom of Italy and the United States does not alter or amend the statutes

of the Commonwealth of Pennsylvania giving a right of action in some cases, to certain persons, for damages for death of a relative, caused by unlawful violance or negligence; but only secures *to subjects* of the Kingdom of Italy *sojourning or residing in the United States* the same protection for *their* persons and property as is possessed by citizens of the United States.

Therefore, there being no statute in the State of Pennsylvania, upon which the plaintiff can rest her right of action, and she, being outside of the terms, intention and effect of the treaty between Italy and the United States, this action must fail, and the judgment of the Supreme Court of Pennsylvania must be affirmed.

The legislation of Pennsylvania, upon the subject of recovering damages by the living, by reason of the death of a human being, is as follows:

> "Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned."
> Act of April 15th, 1851, Section 19. P. L. 674.

This act was amended by Act of April 26, 1855, P. L. 309, which is as follows:

> "Section 1. Persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relative; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy *and that without liability to creditors.*"

"Section 2. The declaration should state who are the parties in such action; the action shall be brought within one year after the death, and not thereafter."

In *Deni vs. Pennsylvania Railroad Company,* 181 Pa., 525, (1897), Maria Deni, a subject of the King of Italy, and a resident of Italy, never a resident or sojourner in the United States, sought to recover damages of the defendant by reason of it negligently causing the death of her son in Pennsylvania. The Supreme Court of Pennsylvania held that she, being a non-resident alien, was not within the right given by the Pennsylvania statutes.

"While it is possible that the language of the statutes may admit of a construction which would include non-resident alien husbands, widows, children and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we cannot adopt it. A non-resident defendant is not entitled to the benefit of our exemption laws, although the language of these laws may admit of a construction which would include him. It has been so held in a number of our cases. In this connection the language of Mr. Justice Sterrett, in Collom's Appeal 2 Pennypacker, 130, is pertinent. In delivering the opinion of the court he said: 'While non-resident debtors may perhaps be within the letter of the act, we do not think they are within its spirit. As was said by Mr. Justice Woodward in *Yelverton vs. Burton,* 2 Casey 351, and afterwards quoted approvingly by the present Chief Justice in McCarthy's Appeal, 18 P. F. Smith, 217, we do not legislate for men beyond our jurisdiction.' In one respect, at least, our act of 1855 resembles our exemption laws. *It is intended, primarily, for the benefit of the family of which the deceased was a member.* The Act of 1851 gave a right of

action to the personal representatives of the deceased. Mr. Justice Green referred to this act in *Books vs. Borough of Danville,* 95 Pa. 158, and said: 'The effect of this act was to make the damages recoverable in such actions general assets of the deceased in the hands of the personal representatives, and of course they were available to creditors in the first instance. It followed that in all cases of insolvent estates of such deceased persons, where the victim of the injury was the husband and father, the widow and children derived little or no advantage from the action, although they were the persons most directly and severely injured.' But this objection to the Act of 1851 was overcome by the Act of 1855 which designated the persons to receive the sum recovered, and directed that they should take it in the proportion they would take the personal estate of the deceased, in case of intestacy, 'and that without liability to creditors.' In *Bacon vs. Horne,* 123 Pa. 452, it was held that the Act of May 3, 1855, P. L. 415, relating to the recording of an assignment made for the benefit of creditors by a resident of another state, which assignment included property of the assignor in this state, was for the protection of our own citizens, and that a creditor of the assignor who was a resident of the state in which the assignment was made would derive no benefit or protection from the act, although he was without notice of the assignment. There is nothing on the face of the act which limits the protection afforded by it to our own citizens. It is referred to as another illustration of the general rule that we do not legislate for persons beyond our jurisdiction.

"We have a number of statutes which expressly confer rights upon aliens, but none which confers them by implication or inference. When the legislature intends to concede to non-resident aliens the rights which

> our own citizens have, under and by virtue of the Act of April 26, 1855, it will say so."

This decision was made in 1897, and has been adhered to as the settled law of the state ever since.

The same conclusion is reached by the Circuit Court of the United States in respect to the statute of Colorado on the same subject: *Brannigan vs. Union Gold Mining Company,* 93 Fed. 164.

The cases, cited to the contrary of the Pennsylvania decision, proceed upon a different theory as to the purpose of the Act than that accepted, adopted and enacted upon in Pennsylvania.

Thus in the Massachusetts case of *Mulhall vs. Fallon,* 176 Mass. 266, where a non-resident alien was allowed to recover under the Massachusetts Act, it is said that the recovery is "primarily a penalty for the protection of the life of a workman in this state," and,—

> "whether the action is to be brought by them (the decedent) or by the administrator, the sum to be recovered is to be assessed *with reference to the degree of culpability of the employer or negligent person.*"

And the same reasoning follows through the cases from other jurisdictions cited in the Brief of the Plaintiff in Error. This construction is not the construction placed upon the statute by the Supreme Court of Pennsylvania, where it has always been held that the statute is intended to give compensation to those dependent upon the life that has been taken away for the loss so sustained; or, as held in the *Deni* case, *supra*: "It is intended, primarily, for the benefit of the family of which the deceased was a member;" and the dam-

ages must be the pecuniary equivalent of the money value to plaintiff of the continuance of the life cut short by the negligence of defendant.

The widow recovers the pecuniary value *to her* of the continuance of the life of the husband which has been cut short. The child recovers the pecuniary value *to him* of the life of the parent of which he has been deprived. . The statute in this state has not been administered as a means of punishing the wrong doer, but as a means of restoring to the person pecuniarily benefited by the continuance of the life taken away, the life so taken, so far as dollars and cents can make such restoration. If the life has been taken under circumstances that call for punishment to the wrong doer, the punishment is left to the public, and statutes have been provided for administering punishment in such cases, but in such punishment, the loss of those dependent for pecuniary support upon the life taken, is not considered.

However this may be, the decision of the court of last resort of the state has interpreted the statute as not including within its protection a non-resident alien, and the case presented is, therefore, just as if Pennsylvania had no statute authorizing a recovery for death by any person whomsoever, or, as if there were an express clause in the statute, excluding from its terms, non-resident aliens as among the persons entitled to compensation for pecuniary loss, occasioned by the death alleged as the cause of action.

Fixed and received construction of the statute laws of a state by its own courts, constitute a part of such statutory law.

Green vs. Neale, 6 Peters 297;
Bank vs, Knopp, 16 Howard 391.

The federal courts will respect state court decisions and will regard them as conclusive in all cases upon the construction of their own constitution and laws.

Brown vs. Runnells, 5 Howard 139;

Bucher vs. Railroad Co., 125 U. S. 583;

Garnley vs. Clark, 134 U. S. 348.

In *Dennick vs. Railroad Company,* 103 U. S. 11, this court said:

> "The right to recover for injury to the person resulting in death is of very recent origin and depends wholly upon statutes of the different states. The questions growing out of these statutes are new, and many of them unsettled. *Each state court will construe its own statute on the subject and differences are to be expected.*"

As said by Ewing, D. J., of the Western District of Pennsylvania, in the case of *Zeiger vs. P. R. R. Co.,* 151 Fed. 348, a case similar to this:

> "Since, therefore, the statutes upon which the plaintiff in this action must rely to recover are purely local statutes and have been interpreted by the Supreme Court of this State as not applicable to non-resident aliens and conferring no right upon them, which decision has been adhered to without variation for the past ten years and has become the settled law of the State and is in conformity with prior decisions upon similar statutes, thus making the policy of the law in this state of the character declared in the Deni Case for a still longer period, and in view of the foregoing United States authorities, as to the binding effect of decisions of the highest court of the state upon the courts of the

United States with respect to the construction of local statutes, I am constrained to sustain the demurrer on the ground that the plaintiff, as a non-resident alien, has no right of action."

This was affirmed by the Circuit Court of Appeals of the Third Circuit in an opinion by Judge Dallas, 158 Fed. Rep. 809.

The same result was reached by District Judge Archbald, in the case of *Fulko vs. Schuylkill Stone Company,* 163 Fed. Rep. 124, now pending, upon appeal, in the United States Circuit Court of Appeals for the Third Circuit.

The treaty between the United States and the Kingdom of Italy does not amend or alter the statutes of Pennsylvania, so as to give a non-resident alien a right of action for the death of a relative under such statutes.

Article 1 of the Treaty states that there should be between the territories of the parties "a reciprocal liberty of commerce and navigation," and

> "Italian citizens *in the United States,* and citizens of the United States in Italy shall mutually have liberty to enter with their ships and cargoes all the ports of the United States and of Italy, respectively, which may be open to commerce;"

and also the liberty *to sojourn and reside* in all parts of the said territories and to enjoy

> *"within* the states and possessions of each party the same rights * * * for their commerce and navigation as the natives of the country wherein they reside."

Article 2 provides that:

> "The citizens of each of the high contracting parties shall have liberty *to travel* in the states and territories

of the other to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, and generally to do anything incident to or necessary for trade, upon the same terms as the natives,—*submitting themselves* to the laws there established."

Article 3 provides:

"The citizens of each of the high contracting parties shall receive, *in the states* and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be rendered to the natives,— upon their *submitting themselves* to the conditions imposed upon the natives."

Article 23 provides that:

"The citizens of either party shall have free access to the courts of justice in order to maintain and defend *their own rights,* without any other conditions restrictions or taxes than such as are imposed upon the natives," and therefor may employ advocates, solicitors, notaries, agents and factors as they may judge proper in all their trials at law, and have opportunity to be present at the decisions and sentences of tribunals in all cases which may concern them, and at the taking of all examinations and evidence in such trials.

From an inspection of these clauses of the Treaty, and others, it is obvious that the Treaty concerns the rights only of the citizens of Italy in the United States, *while sojourning or resident there,* and the rights of the citizens of the United States in Italy, while sojourning or resident there. The entire population of Italy is obviously not within the protection of the rights secured to citizens of Italy in the United States by the terms of the Treaty. This is made perfectly

plain by the words of Article 1, which declares the subject matter of the Treaty. Article 3, upon which reliance is placed by the plaintiff in error, follows immediately Article 2, wherein the right is given to citizens of Italy *to travel in the states and territories of the United States,* to carry on trade, and to hire and occupy houses and warehouses,—all contemplating *the presence of the person in the United States;* then by Article 3, it is stipulated that the citizens of each of the high contracting parties shall receive, *in the states* and territories of the other, the most constant protection and security for their persons and property etc. This, read in connection with the preceding two articles, clearly means that the citizens of each of the high contracting parties, *in the states and territories of the other,* shall receive the most constant protection, etc. It is therefore intended to secure the protection of the person and property of the Italian in the jurisdiction of the United States, and so long as he may remain there. It certainly was not intended to extend the protection of the laws of our country to an Italian resident in Rome, and who has never placed either his person or his property within the jurisdiction of the United States.

Article 23 confers only on the citizens of Italy the right of access to our courts for the purpose of protecting their rights, whatever they may be. It manifestly does not create or give any substantive right of property, but merely gives him access to the courts for the protection of such property rights as he may have within the jurisdiction of the United States.

In Pennsylvania, no right of action has been given to Carmine Maiorano to recover damages for his own death. If one is injured and brings suit to recover for the injury in his lifetime, and subsequently dies as a result of the in-

jury, it is true the right of action survives in the name of the administrator of the decedent by virtue of the 18th Section of the Act of 1851; but where death results from the injury before any suit is brought, the right of action of the injured man dies with him, and does not survive to his administrator or other personal representative. In such case the right of action is given by the Act of 1855, above quoted, to the persons therein enumerated to recover the pecuniary value *to them* of the life that has been taken away. The action is not for the injury to the dead man, but it is to restore compensation for his death to those who were pecuniarily interested in the continuance of the life. It is a new and distinct right of action created by the statute, and vested in the parties named by force of the statute, and does not come to them by way of succession or inheritance from the dead man, because the dead man had no such right.

This has been the uniform holding of the Supreme Court of Pennsylvania ever since litigation began in respect to the right. Thus in *Pennsylvania R. R. Co. against Zebe,* 33 Pa., 318, 329 (1858), in speaking of the right of action vested in the parties by the Act of 1855, the Supreme Court said:

> "This was a new and independent right given by positive law—not cast upon them by survivorship as for an injury to the decedent. *It is for the wrong done to them.*"

And again in *Fink vs. Garman,* 40 Pa. 95 (1861), it is said in speaking of the Act of 1851:

> "The 18th section was apparently intended to regulate a common law right of action, by securing to it survivorship; but the 19th section was creative of a cause of action, wholly unknown to the common law,

And the right of action was *not given to the person suffering the injury,* since no man could sue for his own death, but to his widow or personal representative. It was not survivorship of the cause of action which the legislature meant to provide for by this section, *but the creation of an original cause of action in favour of a surviving widow or personal representative.* It was quite competent for the legislature to alter the common law in this regard. They did so, by giving parties a right of action *who had none before."*

And in *Books vs. Borough of Danville,* 95 Pa. 158, 166, (1880) it is said:

"Moreover, it is too plain for argument that the deceased person never had, or could have, a right of action in advance of his death for damages resulting only from his death, and, therefore, again, *as the right in him never existed, it would not survive to his representative.* In the cause of *Mann vs. Wieand,* 4 W. N. C. 6, (81-1/2 Pa. 243) we held that, the right of action for damages from death by negligence *never existed in the deceased;* that it was given to, and first existed, in the widow, and hence the defendant was a competent witness in his own behalf in an action against him by the widow."

In *Chambers vs. B. & O. R. R. Co.,* 207 U. S. 142, 151, it was declared by this Court that such was the settled interpretation of the Act in Pennsylvania, and from this—

"It appears clearly, therefore, that the cause of action which the plaintiff sought to enforce *was one created for her benefit and vested originally in her."*

And see:

Pennsylvania R. R. Co. vs. Henderson, 51 Pa. 315, 322.

Birch vs. Railroad Company, 165 Pa. 339, 345.

McCafferty vs. Railroad Co., 193 Pa. 339, 345.

Nor is the purpose of vesting in the widow a right to recover compensation for the pecuniary loss sustained by her from the death of her husband in the nature of a punitive action, or for the purpose of protecting the life of the deceased, as argued by the plaintiff in error; as said in the *Deni Case,* above cited—

> *"It is intended primarily for the benefit of the family of which the deceased was a member,"* and to restore to them who are dependent upon the life taken away pecuniary compensation for the loss so sustained; as said by this Court, in *Stewart vs. B. & O. R. R. Co.* 168 U. S. 445, 448:
>
> "Such statutes are not penal, *but remedial for the benefit of the persons injured by the death.*"

Punishment of the wrong doer is not the object of the act, but restoration to the widow and children of the means of support, of which the wrong doer has deprived them, in taking away the life of their bread winner.

So, the plaintiff in this action is not attempting to assert any right that belonged to her husband, or which devolved upon her by way of succession from her husband, intended for protection of his person, but she is attempting to assert that the statute of Pennsylvania has cast upon her (a non-resident alien), originally, and as a new and independent right, a cause of action to recover, *her* loss by the death of her husband, and this, notwithstanding, that it is the settled law of Pennsylvania that there is no such statute in existence in this state.

She can show, therefore, no such right existing in her under the statutes of Pennsylvania, and never being a sojourner or resident in the United States, or any part thereof, she is clearly outside of the terms of the Treaty between

the Kingdom of Italy and the United States, and her action must fail.

For convenience we add hereto the opinion of Judge Archbald in the case of *Fulco vs. Schuylkill Stone Co.*, which contains a clear judicial discussion of the question above presented.

Fulco vs. Schuylkill Stone Co., 163 Fed., 124 (1908), Archbald, D. J.:

> "The plaintiffs are citizens and residents of Italy and the subjects of its King, and bring suit for damages for the death of their son, who was killed, as they allege, by the negligence of the defendant company by whom he was employed. The accident by which he lost his life occurred in Pennsylvania, and suit is brought on the statutes of that state, giving a right of action to the parents of the deceased in such cases. Act April 15, 1851, Sec. 19 (P. L. 674); Act April 26, 1855, Sec. 1 (P. L. 309). It is contended by the defendants that the plaintiffs, being non-resident aliens, have no right to sue, and it is upon this that the demurrer proceeds. It was decided by the Supreme Court of Pennsylvania, in *Deni vs. Pennsylvania Railroad,* 181 Pa. 525, 37 Atl, 558, 59 Am. Rep. 676, and again in *Maiorano vs. Baltimore and Ohio R. R.,* 216 Pa., 402, 65 Atl. 1077, 116 Am. St. Rep. 778, that non-resident aliens are not entitled to the benefit of this legislation, not being within its purview, and have no standing in consequence to maintain an action founded upon it.
>
> "It is contended as to this that the plaintiffs are protected by the existing treaty between the United States and Italy of February 26, 1871 (17 Stat, 845), which provides:

"'Art. 3. The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives.

"'Art. 23. The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions, or taxes than such as are imposed upon the natives. They shall, therefore, be free to employ in defence of their rights, such advocates, solicitors, notaries, agents and factors as they judge proper, in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of all tribunals in all cases which may concern them, and likewise at the taking of all examinations and evidences which may be exhibited in the said trials.'

"There was no reference to this treaty in the *Deni* or the *Zeiger* case; although there was in the *Maiorano*, where it was decided to have no effect; the Court holding that, while the treaty may in terms include the entire citizenship of Italy, it obviously is available only to those who, either with respect to their persons or property, are within the jurisdiction of the United States. This is a federal question, and the decision of the State Court is not controlling; but upon an independent consideration of it, the same conclusion is to be reached.

"The rights guaranteed to the citizens of Italy by the one article (3) are constant protection and security for their persons and property, as to which they are to enjoy the same rights and privileges as are or shall

be guaranteed to natives. The other article (23) merely preserves the right to resort to the Courts to maintain and defend their rights, without other conditions or restrictions than are imposed on natives. But in so guaranteeing protection and security to the persons and property of citizens of Italy, *it is manifest that this can only refer to the persons and property of such citizens when within the states and territories of this country.* There certainly is no intended guaranty of their persons elsewhere, and neither is there of their property.

"What property, or right of property, then, under the laws of Pennsylvania, do the plaintiffs show which it not accorded to them? Certainly they had none in the person or the earnings of their son, for whose death they sue; it not being alleged that he was a minor—if that makes any difference—but merely that he contributed to their support. The continued expectation of this, no doubt, may measure the loss sustained by the parents by the death of a child, but in no sense is it property, *North Penn Railroad vs. Robinson,* 44 Pa., 175, to the contrary, notwithstanding. *Moe vs. Smiley,* 125 Pa., 136, 141; 17 Atl. 228; 3 L. R. A., 341. Nor, apart from the statute did the defendant company owe the plaintiffs any duty to see that their son had a reasonably safe place to work in, the lack of which is the negligence charged, however much they may have owed it to the son himself; *this action not being for the enforcement of any obligation to the party killed, which has been transmitted to his parents, through him, but for a distinct cause of their own, if they have any.*

"The whole contention, then, is brought down to this: That, a right of action being given by the laws of Pennsylvania to its own citizens, under similar cir-

cumstances, citizens of Italy are entitled to the same, regardless of anything else, because the treaty guarantees the same rights and privileges, as to their persons and property, as are enjoyed by natives. The treaty, in other words, is invoked to raise or force a right, where none exists without it; *but that is not the way it reads. A right existing,* it provides that it shall be respected in the same manner and to the same extent in the case of a native of Italy as of a native of this country. It by no means undertakes to put them both in all respects and under all conditions, on an absolute par, to which the doctrine contended for necessarily leads.

"The State of Pennsylvania, had it so chosen, was at perfect liberty to provide, in so many words, in favor of its own citizens only, that in case of death by negligence a right of action should accrue to certain specified relatives, declining to extend it to residents of other countries; but, by the construction put upon the statute by the Supreme Court of the State, that in effect is just what has been done, it being the same as though this proviso was written into it, which the treaty cannot be made to override. It was for the State, in other words, to give or to withhold the right, as well as to define the extent of it, and the parties who were to be benefited, and, having withheld it in such a case as we have here, that is that end of the matter."

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